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Supreme Court of the United States

OCTOBER TERM, 1957

No. 684

D. B. LEWIS, PRESIDENT, LEWIS FOOD COMPANY; HENRY MELLO; MAYNARD (MAC) FOLDEN; ET AL., PETITIONERS,

vs.

NATIONAL LABOR RELATIONS BOARD.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 23, 1957
CERTIORARI GRANTED JANUARY 27, 1958

No. 15307

United States
Court of Appeals
for the Ninth Circuit.

NATIONAL LABOR RELATIONS BOARD,
Appellant,

vs.

D. B. LEWIS, PRESIDENT, LEWIS FOOD COMPANY, et al.,
Appellees.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court, Southern District of California, Central Division

Civil No. 20119-TC

NATIONAL LABOR RELATIONS BOARD,
Applicant,

v.

D. B. LEWIS, PRESIDENT, LEWIS FOOD COMPANY; HENRY MELLO; MAYNARD (MAC) FOLDEN; GRAMMONT BANVILLE; JOE LOERA; ANASTACIO HOLQUIN; WILLIAM L. (ROY) MILLER; OTTO SCHUBERT; WALTER O. LISSER; AND WALTER SCHMIDT, SECRETARY-TREASURER OF ASSOCIATION OF INDEPENDENT WORKERS OF AMERICA,
Respondents.

APPLICATION FOR ORDER REQUIRING OBEDIENCE TO SUBPENAS AD TESTIFICANDUM AND DUCES TECUM

To the Honorable, the Judges of the United States District Court for the Southern District of California, Central Division.

The National Labor Relations Board, hereinafter referred to as the Board, an administrative agency of the Federal Government created pursuant to the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. Supp. V. Sec. 151, et seq.), hereinafter referred to as the Act, by its General Counsel

and by Daniel J. Harrington, its Chief Law Officer for the Twenty-First Region, respectively, applies to this Honorable Court pursuant to Section 11(2) of the Act, for an order requiring D. B. Lewis, President, Lewis Food Company; Henry Mello; Maynard (Mac) Folden; Grammont Banville; Joe Loera; Anastacio Holquin; William L. (Roy) Miller; [2] Otto Schubert; Walter O. Lisser and Walter Schmidt, Secretary-Treasurer of Association of Independent Workers of America, to obey certain subpenas issued by the Board and duly served upon them in the manner provided by law. In support of said application, upon information and belief, the Board respectfully shows as follows:

1. This Court has jurisdiction of the subject matter of the proceeding, and of the Respondents, by virtue of Section 11(2) of the Act, in that the inquiry in aid of which the subpenas were issued was carried on within this judicial district, and Respondents all reside and do business in this judicial district.

2. Pursuant to the provisions of Section 6 of the Act, the Board has issued Rules and Regulations, Series 6, as amended, effective June 3, 1952, hereinafter referred to as the Rules, governing the conduct of its operations, which Rules have been duly published in the Federal Register (17 F.R. 4982), as provided for in the Administrative Procedure Act (5 U.S.C. 1002). This Court may take judicial notice of said Rules by virtue of the provisions of 44 U.S.C. 307.

3. Pursuant to the provisions of Section 10 (b) of the Act, there are now pending before the Board three unfair labor practice proceedings entitled Lewis Food Company, Cases Nos. 21-CA-2061 and 21-CA-2203, and Association of Food Handlers, a/k/a Association of Pet Food Manufacturing Employees, a/k/a Association of Pet Food Manufacturers Employees, a/k/a Association of Independent Workers, Case No. 21-CB-708, respectively, wherein Charges and an Amended Charge have been filed and served, an Order Consolidating Cases and Notice of Hearing and a Consolidated Complaint have issued, Answers have been filed and Bills of Particulars have been filed, all in the manner and form required by law and by Sections 102.9, 102.10, 102.15, 102.20 and 102.33 of the Board's Rules. Copies of said Charges, Amended Charge, Order Consolidating Cases and Notice of Hearing, Consolidated Complaint, Answers and Bills of Particulars are annexed hereto and made a part hereof, designated Exhibits A, B, C, D, E, F, G, H, I and [3] J, respectively.

4. In relation to the proceedings described in paragraph 3, above, the Board did cause to be issued at the written request of counsel for General Counsel on June 4, 1956, subpenas ad testificandum directed to Joe Loera, Anastacio Holquin, William L. (Roy) Miller, Otto Schubert, Walter O. Lisser, Henry Mello and Maynard (Mae) Folden, requiring said Respondents to appear and testify at a hearing before a Trial Examiner of the Board on June 11,

1956, at 10:00 o'clock in the morning, at Room 704, 111 West Seventh Street, Los Angeles, California, and the Board did cause to be issued at the written request of counsel for the General Counsel on June 5, 1956, a subpena ad testificandum directed to Grammont Banville, requiring said Respondent to appear and testify at a hearing before a Trial Examiner of the Board on June 12, 1956, at 9:30 o'clock in the morning, at Room 704, 111 West Seventh Street, Los Angeles, California, and the Board did cause to be issued at the written request of counsel for General Counsel on June 1, 1956, subpenas duces tectum directed to Walter Schmidt, Secretary-Treasurer of Association of Independent Workers of America, and D. B. Lewis, President, Lewis Food Company, requiring said Respondents to appear before a Trial Examiner of the Board on June 11, 1956, at 10:00 o'clock in the morning, at Room 704, 111 West Seventh Street, Los Angeles, California, and to then and there give testimony and produce certain records and papers more fully described and particularized in said subpenas duces tecum. All said subpenas were issued under the authority and form provided for in Section 11(1) of the Act and Section 102.31(a) of the Rules. Said subpenas were duly served upon Respondents by registered mail in the manner provided for in Section 11(4) of the Act and Section 102.80 of the Rules. Copies of these subpenas directed to all Respondents are attached hereto and marked Exhibits K, L, M, N, O, P, Q, R, S and T, respectively.

5. Pursuant to Section 11(1) of the Act and Sec-

tion 102.31(b) of the Rules, all Respondents, through counsel, did on June 11, 1956, [4] file with the Regional Director of the Twenty-First Region of the Board Petitions to Revoke Subpenas on certain grounds therein set forth, which Petitions were referred by the Regional Director by formal Orders, issued on June 11, 1956, to the Trial Examiner for ruling. On June 11, 1956, the Trial Examiner considered the Petitions to Revoke Subpenas, supporting memoranda, and heard argument, and denied said Petitions. Copies of said Petitions to Revoke Subpenas, of said Orders of the Regional Director and that portion of the transcript wherein the Trial Examiner heard argument and denied the Petitions are annexed hereto and marked Exhibits U, V, W, X, Y, Z and AA, respectively.

6. Although the Trial Examiner denied the Petitions to Revoke Subpenas Ad Testificandum, Respondents who were so subpenaed failed to appear at said hearing at the time and place set out in the subpenas and to then and there give testimony. Although the Trial Examiner denied the Petitions to Revoke the Subpenas Duces Tecum, Respondents so subpenaed failed to appear at said hearing in response to said subpenas and to testify and to produce the evidence as therein called for and as required by the terms of said subpenas duces tecum and have at all times since failed and refused and continue to fail and refuse to produce the records and documents called for in said subpenas and to testify.

7. At said hearing as more fully shown in the

partial transcript of hearing, counsel for Respondents stated that they would advise their clients not to appear and testify or produce records on the grounds that the subpenas were void.

8. The refusal of Respondents to appear and testify and/or to produce the required records in obedience to the subpenas, which testimony and records are relevant to the investigation and to the issues in the proceedings before the Board, constitutes contumacious conduct within the meaning of Section 11(2) of the Act, which conduct has impeded and continues to impede the Board in the investigation of the matters before it and has prevented and is preventing the Board from [5] carrying out its duties and functions under the Act.

9. No previous application has been made for the relief requested herein.

Wherefore, the Applicant, the National Labor Relations Board, respectfully prays:

(a) That an order be issued forthwith directing Respondents Henry Mello, Maynard (Mac) Folden, Grammont Banville, Joe Loera, Anastacio Holquin, William L. (Roy) Miller, Otto Schubert and Walter O. Lisser to appear before Wallace Royster, the Trial Examiner designated by the Board in Cases Nos. 21-CA-2061, 21-CA-2203 and 21-CB-708, pending before said Board, at such time and place as said Trial Examiner may designate, and there give testimony and answer any and all questions which may be propounded to them in connection with the matters under investigation and in question in said

proceedings before the Board, and further directing that Respondents D. B. Lewis, President of Lewis Food Company, and Walter Schmidt, Secretary-Treasurer of Association of Independent Workers of America, appear before Wallace Royster, the Trial Examiner designated by the Board in Cases Nos. 21-CA-2064, 21-CA-2203 and 21-CB-708, pending before said Board, at such time and place as said Trial Examiner may designate, and there and then testify and answer any and all questions which may be propounded to them in connection with the proceedings before the Board and, in addition, to then and there produce the records described in Exhibits K and T.

(b) That the costs of this proceeding be taxed and adjudged against Respondents, together with such other sum as will reasonably compensate the National Labor Relations Board as an agency of the United States Government for the expenses and costs actually incurred in connection with the prosecution of this proceeding to compel obedience to subpenas of the National Labor Relations Board.

(c) That the Applicant, National Labor Relations Board, [6] have such other, further and different relief as to the Court may seem necessary and appropriate.

Dated at Los Angeles, California, this 29th day of June, 1956.

NATIONAL LABOR RELATIONS BOARD,

/s/ By THEOPHIL C. KAMMHOLZ,

General Counsel

/s/ DANIEL J. HARRINGTON,
Chief Law Officer, Twenty-First Region

/s/ E. DON WILSON,
Attorney [7]

EXHIBIT A

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

Case No.: 21-CA-2061. Date Filed: 8-27-54. Compliance Status Checked By: /s/ HA.

1. Employer Against Whom Charge Is Brought: Lewis Food Company.

Address of Establishment: 817 East 8th Street, Los Angeles, California.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a), subsections (1) and 8 (a) 2 of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge:

The following persons were discharged for Union activity and specifically because they had made application to join Local Union No. 626:

Joseph Flores—1203 West 31st Street, Los Angeles 7, California.

Applied for membership about August 7th. Had worked at plant 60 days without any complaint

whatever on his work. The guard at the door who admits employees, had a list, upon which was marked the names of certain people to be discharged. As they entered the plant, the guard checked this list, and from this check directed them to the office to be discharged.

Jesus Carabajal—641 N. Merida Avenue, Los Angeles 22, California.

Employed six months—applied for Union membership about August 1st; discharged about August 15th. No complaints whatever on his work. Guard instructed him to pick up final check.

Antonio Flores—5912 Woodlawn Avenue, Los Angeles, California.

Employed three and one-half years—no complaints on his work. Applied for membership with the Union about July 15th; discharged Monday, August 8th, after meeting of employees in Teamsters' group the previous Friday. Taken to office by Nathan Lewis, brother of the plant owner, and Joe Luera, Foreman, from his machine while working about 3:30 P. M. No complaints on work. This man, while waiting in the office, overheard the President of the Company Association, Walt Smith, talking to the owners in an adjoining room. Smith told the owner they were going to fire all the men who had joined the Teamsters' Union, and that five or six men were on the list for discharge the next day. Smith was telling the members who to fire.

Salvadore Jiminez—824 E. 18th Street, Los Angeles 21, California.

Worked at Lewis six years and five months.

About four days prior to August 14th, was requested to break in a new man for four days, and applied for membership in the Union in July—discharged on August 14th.

Lewis Perez—2843 Blanchard Street, Los Angeles 33, California.

Employed 14 months. Filed Union application about August 7th; discharged August 11th. No complaints on his work. Was told nothing as cause for discharge. Guard instructed him to go to the office after consulting a list which he had containing names of men to be fired. The guard said: "You are one of them—go to the office." Employer had him break in a man on his machine the day previous.

Jesus Serrano—5847 S. Denver Avenue, Los Angeles 44, California.

Employed two months—no complaints on work. Applied for membership on August 11th—discharged two days later, on August 13th. Foreman Joe Luera gave no reason for discharge, simply stated he had replacement for him. Following these discharges, workers struck on August 19th, in protest against discharges for Union activity, and have picketed ever since.

Wednesday, August 25th:

Company fired 20 strikers as they came into the plant to get their pay checks. In the succeeding three days, as strikers went to get their checks, 25 more were discharged. Horace Lewis, brother of owner in charge of warehouse, came out to picket line and asked two employees to return to work on Thursday, August 26th. These men did not return

to work. They were Jose Vracamonte of 3339 E. 4th Street, Los Angeles, California, and Casmiro Lovato Jr., of 3011 E. 5th Street, Los Angeles, California.

This strike is solely in protest against unfair labor practices in discharges. [9]

3. Full name of Party Filing Charge: Meat & Provision Drivers, Local Union No. 626.

4. Address: 846 South Union Avenue, Los Angeles, California. Telephone No.: DU. 7-3359.

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit: International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, A.F.L.

6. Address of National or International, if any: 100 Indiana Avenue, N.W., Washington, D. C.

7. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

Date: August 27th, 1954.

/s/ By CHARLES RICO,
Business Representative of
Local 626 [8]

EXHIBIT B

United States of America
National Labor Relations Board

CHARGE AGAINST EMPLOYER

Case No.: 21-CA-2203. Date Filed: 3-29-55.

1. Employer Against Whom Charge Is Brought: Lewis Food Company.

Number of workers employed: 500.

Address of establishment: 817 East 18th Street, Los Angeles 21, California.

Type of establishment: Cannery.

Identify principal product or service: Animal food.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8 (a), subsections (1) and (2) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge:

The above-named Employer, acting through its agents, officers and employees, discharged the undersigned on March 24, 1955, because of his complaint to the Association of Food Handlers concerning their deduction of dues and initiation fees before the undersigned had completed 30 days of work for the Employer, all in violation of Section 8 (a) (1) and (3) of the Act. The Secretary of the

Association of Food Handlers is employed by the Lewis Food Company as a supervisor in violation of Section 8 (a) (2) of the Act.

By these and other acts, said Employer has interfered with, restrained and coerced its employees in their rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge: Otto A. Roth.

4. Address: 15619 Septo Street, San Fernando, California. Telephone No. (None).

* * * * *

7. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

Date: March 29, 1955.

/s/ By OTTO A. ROTH
An Individual [10]

EXHIBIT C

FIRST AMENDED CHARGE AGAINST EMPLOYER

Case No.: 21-CA-2203. Date Filed: 6/24/55.

1. Employer Against Whom Charge Is Brought: Lewis Food Company.

Number of Workers Employed: 500.

Address of Establishment: 817 East 18th Street, Los Angeles 21, California.

Type of Establishment: Cannery.

Identify Principal Product or Service: Animal Food.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (2) and (3) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. Basis of the Charge:

The above-named Employer, acting through its agents, officers and employees, discharged the undersigned on March 24, 1955, because of his complaint to the Association of Food Handlers concerning their deduction of dues and initiation fees before the undersigned had completed 30 days of work for the Employer, all in violation of Section 8(a) (1) and (3) of the Act. The Secretary of the Association of Food Handlers is employed by the Lewis Food Company as a supervisor in violation of Section 8(a) (2) of the Act.

The Employer, acting through its agents and supervisors, has since October 1, 1954, and at various times previous thereto, and at all times since, interfered with the formation and administration of the Association of Food Handlers, has dominated the administration of the Association of Food Handlers, and has contributed financial support to it, in violation of Section 8 (a) (2) of the Act.

By these and other acts, said Employer has interfered with, restrained and coerced its employees in their rights guaranteed in Section 7 of the Act.

3. Full Name of Party Filing Charge: Otto A. Roth.

4. Address: 15619 Septo Street, San Fernando, California. Telephone No.: (None).

* * * * *

7. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

/s/ By OTTO A. ROTH
An Individual [11]

EXHIBIT D

United States of America
National Labor Relations Board

CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

Case No.: 21-CB-708. Date Filed: 3/29/55.

1. Labor Organization or Its Agents Against Which Charge Is Brought: Association of Food Handlers.

Address: 817 East 18th Street, Los Angeles 21, California.

The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of Section 8 (b) subsection(s) (1) (A) and (2) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge:

The above-named Labor Organization, acting through its officers, agents and employees, caused the Lewis Food Company to discharge the undersigned on March 24, 1955, because of his complaint to the Union concerning deduction of dues and initiation fees prior to his being employed by the Employer for a period of 30 days.

By these and other acts, said Labor Organization has restrained and coerced the employees of Lewis Food Company in their rights guaranteed in Section 7 of the Act.

3. Name of Employer: Lewis Food Company.

4. Location of Plant Involved: 817 East 18th Street, Los Angeles 21, California.

5. Type of Establishment: Cannery.

6. Identify Principal Product or Service: Animal Food.

7. No. of Workers Employed: 500.

8. Full Name of Party Filing Charge: Otto A. Roth.

9. Address of Party Filing Charge: 15619 Septo Street, San Fernando, California.

10. Telephone No.: (None).

11. Declaration: I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

Date: March 29, 1955.

/s/ By OTTO A. ROTH.
An Individual [12]

EXHIBIT E

United States of America
Before The National Labor Relations Board
Twenty-First Region

Case No. 21-CA-2061

LEWIS FOOD COMPANY and MEAT AND PROVISION DRIVERS, LOCAL UNION NO. 626, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO.

Case No. 21-CA-2203

LEWIS FOOD COMPANY and OTTO A. ROTH, An Individual.

Case No. 21-CB-708

ASSOCIATION OF FOOD HANDLERS, a/k/a ASSOCIATION OF PET FOOD MANUFACTURING EMPLOYEES, a/k/a ASSOCIATION OF PET FOOD MANUFACTURERS EMPLOYEES, a/k/a ASSOCIATION OF INDEPENDENT WORKERS and OTTO A. ROTH, An Individual.

ORDER CONSOLIDATING CASES AND NOTICE OF HEARING

The General Counsel for the National Labor Relations Board having duly considered the matter and deeming it necessary in order to effectuate the

purposes of the National Labor Relations Act, as amended, and to avoid unnecessary costs or delay,

Hereby orders, pursuant to Section 102.33 (b) of the National Labor Relations Board Rules and Regulations, Series 6, as amended, that these cases be, and they hereby are, consolidated. [13]

Please Take Notice that on the 28th day of May, 1956, at 10:00 a.m., D.S.T., in Room 704, 111 West Seventh Street, Los Angeles, California, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the Consolidated Complaint attached hereto, at which time and place you will have the right to appear in person, or otherwise, and give testimony. Copies of the Charges upon which the Consolidated Complaint is based are attached hereto.

You are further notified that, pursuant to Section 102.20 of the Board's Rules and Regulations, you shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an answer to the said Consolidated Complaint within ten (10) days from the service thereof and that unless you do so all of the allegations in the Consolidated Complaint shall be deemed to be admitted as true and may be so found by the Board.

In Witness Whereof, the General Counsel of the National Labor Relations Board, on behalf of the Board, has caused this Consolidated Complaint and Order Consolidating Cases and Notice of Hearing

to be signed by the Regional Director for the Twenty-First Region on this 30th day of April, 1956.

[Seal] /s/ HENRY W. BECKER,
Regional Director, National Labor Relations Board,
Twenty-First Region. [14]

EXHIBIT F

[Title of Board and Causes.]

CONSOLIDATED COMPLAINT

It having been charged by the Meat and Provision Drivers, Local Union No. 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, hereinafter referred to as the Union, and by Otto A. Roth, an individual, that Lewis Food Company, hereinafter referred to as the Employer, and the Association of Food Handlers, also known as Association of Pet Food Manufacturing Employees, also known as Association of Pet Food Manufacturers Employees, and also known as Association of Independent Workers, hereinafter referred to as the Association, and each of them, have engaged in and are engaging in certain unfair labor practices affecting commerce as set forth and defined in the [15] National Labor Relations Act, as amended, Public Law 101, 80th Congress, First Session, hereinafter called the Act, and the General Counsel of the National Labor Relations Board, on behalf of the Board, having issued an Order of Consolidation, the Regional

Director for the Twenty-First Region, designated by the Board's Rules and Regulations, Series 6, as amended, Section 102.15, hereby issues this Consolidated Complaint and alleges as follows:

1. The Employer, a California corporation, is engaged at Los Angeles, California, in the manufacture of pet foods. The Employer annually sells and ships products valued at in excess of $250,000 from its Los Angeles, California, plant to points and places outside the State of California.

2. The Employer is, and at all times material herein has been, engaged in commerce within the meaning of the Act.

3. The Union is a labor organization within the meaning of Section 2, subsection (5) of the Act.

4. The Association is a labor organization within the meaning of Section 2, subsection (5) of the Act.

5. On or about March 23, 1955, the Association, through its officer, Walter Schmidt, restrained and coerced Otto A. Roth, an employee of the Employer, in the exercise of his right under Section 7 of the Act to refrain from joining or assisting the Association and to bargain collectively through the Association and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection in that, among other things, the Association, through its officer, Walter Schmidt, caused the Employer to deduct from the wages of said Otto A. Roth an initiation fee and

dues against the will of Otto A. Roth and although said Roth had been employed less than 30 days.

6. On or about March 24, 1955, the Association, through said Walter Schmidt, caused the Employer to discharge Otto A. Roth for the purpose of encouraging membership in the Association and because he complained about and demanded the return of the aforesaid deductions from his wages.

7. On or about March 23, 1955, the Employer discriminated in regard to the terms and conditions of employment of Otto A. Roth for the purpose of encouraging membership in the Association by deduction from Otto A. Roth's wages an initiation fee and dues for the Association against the will of said Otto A. Roth and although said Roth had been employed less than 30 days, and contrary to the rights guaranteed to Otto A. Roth in Section 7 of the Act.

8. On or about March 24, 1955, the Employer, through its agent, Walter Schmidt, and its agent, Henry Mello, discharged Otto A. Roth for the purpose of encouraging membership in the Association and, more particularly, because said Otto A. Roth complained that an initiation fee and dues had been deducted by the Employer, at the demand of the Union, from his wages against his will and although he had been employed less than 30 days and because he sought to exercise rights guaranteed to him by Section 7 of the Act.

9. The Employer, since on or about January 1952, has dominated and interfered with the forma-

tion and administration of the Association and has contributed financial and other support to the Association.

10. The Employer, since on or about February 27, 1954, to date, has dominated, assisted, contributed to the support of, and interfered with the administration of the Association.

11. By the acts set forth in paragraphs 5 and 6 above, the Association did engage in and is engaging in unfair labor practices within the meaning of Section 8 (b), subsection (1) (A) and subsection (2) of the Act.

12. By the acts set forth in paragraphs 7 and 8 above, the Employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a), subsections (1), (2) and (3) of the Act.

13. By the acts set forth in paragraph 10 above, the Employer has engaged in and is engaging in unfair labor practices within the meaning of Section 8 (a), subsections (1) and (2) of the Act. [17]

14. The activities of the Association set forth in paragraphs 5 and 6 above, occurring in connection with the Employer's operations described in paragraph 1 above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states of the United States and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

15. The activities of the Employer set forth in paragraphs 7, 8 and 10 above, occurring in connection with the Employer's operations described in paragraph 1 above, have a close, intimate and substantial relation to trade, traffic and commerce among the several states of the United States and have led and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

16. The aforesaid acts of the Employer, as described above, constitute unfair labor practices within the meaning of Section 8 (a), subsections (1), (2) and (3), and Section 2, subsections (6) and (7) of the Act.

17. The aforesaid acts of the Association, as described above, constitute unfair labor practices within the meaning of Section 8 (b), subsections (1) (A) and (2), and Section 2, subsections (6) and (7) of the Act.

Wherefore, the General Counsel of the National Labor Relations Board, on behalf of the Board, by the Regional Director for the Twenty-First Region, on this 30th day of April 1956, issues this Consolidated Complaint against the above-named Employer and Association, Respondents herein.

[Seal] /s/ HENRY W. BECKER,
Regional Director, National Labor Relations Board,
Twenty-First Region. [18]

[Title of Board and Causes.]

EXHIBIT G

ANSWER OF LEWIS FOOD COMPANY

Without waiving its right to make motions or to make objections to rulings upon motions in connection with the foregoing proceedings, Lewis Food Company does file its Answer and admits, denies and alleges as follows:

I.

Lewis Food Company admits the allegations of Paragraphs 1, 2, 3 and 4 of the Complaint.

II.

Lewis Food Company denies, generally and specifically, [19] each and every one of the allegations of Paragraphs 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16 and 17 of the Complaint.

Wherefore, Lewis Food Company prays that the National Labor Relations Board take nothing by this Complaint.

Dated: May 21, 1956.

WILLIAM H. WILSON,
HILL, FARRER & BURRILL,
/s/ By RAY L. JOHNSON, JR.,
Attorneys for Lewis Food Company

Certificate of Service Attached. [20]

[Title of Board and Causes.]

EXHIBIT H

ANSWER

Comes now the Association of Food Handlers, aka Association of Pet Food Manufacturing Employees, aka Association of Pet Food Manufacturers Employees, aka Association of Independent Workers, hereinafter designated as "the Association", and files its answer to the consolidated complaint; admits, denies and alleges as follows: [21]

I.

That the Association is without knowledge as to paragraphs 1, 2, 3, 7, 8, 12, 16 and that portion of paragraph 15 which refers to paragraphs 7 and 8, and on this ground denies generally and specifically the charges in the consolidated complaint.

II.

Denies generally and specifically paragraphs 5, 6, 9, 10, 11, 13, 14, 17 and that portion of paragraph 15 which refers to paragraph 10, of the consolidated complaint.

Wherefore, respondent prays that the consolidated complaint be dismissed, and for such other further relief as the Board deems just and proper.

Dated: May 21, 1956.

LAW OFFICES, ALVA C. BAIRD,
/s/ By THOMAS A. BAIRD,
Attorneys for the Association

[Title of Board and Causes.]

EXHIBIT I

BILL OF PARTICULARS

In compliance with the Order of Trial Examiner Herman Marx, dated May 14, 1956, Counsel for General Counsel furnishes to the Respondent, Lewis Food Company, the following particulars:

1. Respondent Lewis Food Company, through its officers and agents, D. B. Lewis, W. J. Stratton, Horace Lewis, William Wilson and Gerald Riley, conceived the idea of forming and actively participated in forming and bringing into existence the Association.

2. Respondent Lewis Food Company, through its officers and agents, D. B. Lewis, W. J. Stratton, Anastácio Holquin, James Elliott, Albert Saavedra, Joseph Loera, V. E. Thrailkill, M. S. Bjorlin, Albert Blalock, Walter Schmidt, John Ball, Grammont Banville, William Davidson, Maynard Folden, Henry Mello, Dave Russell, A. Sherratt, Nathan Lewis and others whose names are at this time unknown to Counsel for the General Counsel, has since the formation of the Association in January 1952, to date, actively participated in managing, directing, controlling and [23] administering the affairs, activities and policies of the Association and has made available to the Association the Respondent's facilities and services and has conditioned hiring on the signing of applications for membership in the Association and requests for

deduction by the Respondent of initiation fees and dues for the Association and has deducted dues and initiation fees for the Association from the wages of Otto A. Roth, DeWitt Chapman and John J. Charles and other employees whose names are at this time unknown to Counsel for the General Counsel, although said employees had been employed less than 30 days and did not authorize said deductions.

Dated at Los Angeles, California, this 16th day of May 1956.

/s/ E. DON WILSON,
Counsel for the General Counsel, National Labor Relations Board. [24]

EXHIBIT J

[Title of Board and Causes.]

BILL OF PARTICULARS

In compliance with the Order of Trial Examiner Herman Marx, dated May 14, 1956, Counsel for General Counsel furnishes to the Respondent, the Association, the following particulars:

1. Included in the phrase "among other things" in paragraph 5 of the Consolidated Complaint is the conduct of the Association in restraining and coercing Otto A. Roth, DeWitt Chapman and John J. Charles, employees of the Employer, in the exercise of their rights under Section 7 of the Act, in that the Association, through its officer, Walter Schmidt, caused the Employer to deduct from the

cases of said DeWitt Chapman and John J. Charles initiation fees and dues against their wills and although each had been employed less than 30 days.

Dated at Los Angeles, California, this 16th day of May 1956.

/s/ E. DON WILSON,
Counsel for the General Counsel, National Labor Relations Board. [25]

EXHIBIT K

United States of America
National Labor Relations Board

SUBPENA DUCES TECUM

To: D. B. Lewis, President; Lewis Food Company
817 East 18th Street
Los Angeles 21, California

Request therefor having been duly made by E. Don Wilson, Counsel for General Counsel, National Labor Relations Board, whose address is 111 W. Seventh Street, Los Angeles, California,

You are hereby required and directed to appear before a Trial Examiner of the National Labor Relations Board, at Room 704, 111 W. Seventh Street, in the City of Los Angeles, California, on the 11th day of June, 1956, at 10:00 o'clock a.m. of that day to testify in the Matter of Lewis Food Company, et al; and Meat and Provision Drivers, Local Union No. 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and

Helpers of America, AFL-CIO, et al., Cases Nos. 21-CA-2061, et al.

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

1. Termination Notice, dated on or about August 16, 1954, for Jesus Carabajal.

2. Termination Notice, dated on or about August 13, 1954, for Jesus Serrano.

3. Termination Notice, dated on or about January 17, 1952, for Arnold Gomez.

4. Payroll records showing the dates when Walter Gorablenkow, DeWitt Chapman, John Charles, Otto Roth, Daniel Turk, James Aitken and Ivan Maier began working for Lewis Food Company and the dates when initiation fees and/or dues for the Association were deducted from their pay, if such initiation fees and/or dues were deducted.

5. The applications for employment at Lewis Food Company made by Otto Roth, Walter Gorablenkow, DeWitt Chapman, John Charles, Daniel Turk, James Aitken and Ivan Maier in 1954 or 1955 and application for employment made by Jose Flores in 1954.

6. Termination Notices for Elmer Hadley and C. E. Straiton, dated on or about December 27, 1954 and Termination Notice for Otto Ziemendorf, dated on or about February 27, 1955.

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Los

Angeles, California, this 1st day of June, 1956.

[Seal] Abe Murdock [26]

B-28669.

Received from the Postmaster the Registered or Insured Article, the number of which appears on the face of this return receipt. 1. D. B. Lewis. 2. H. W. Lewis. Date of delivery: June 2, 1956. [28]

EXHIBIT L

United States of America
National Labor Relations Board

SUBPENA

To: Henry Mello
4941 Weik Avenue
Bell, California

Request therefor having been duly made by E. Don Wilson, Counsel for General Counsel, National Labor Relations Board, whose address is 111 W. Seventh Street, Los Angeles, California,

You are hereby required and directed to appear before a Trial Examiner of the National Labor Relations Board, at Room 704, 111 West Seventh Street, in the City of Los Angeles, California, on the 11th day of June, 1956, at 10:00 o'clock a.m. of that day, to testify in the Matter of Lewis Food Company, et al. and Meat and Provision Drivers, Local Union No. 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, et al., Cases Nos. 21-CA-2061, 21-CA-2203, 21-CB-708.

In testimony whereof, the seal of the National

Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Los Angeles, California, this 4th day of June, 1956.

[Seal] Abe Murdock [28-A]

A-77950.

Received from the Postmaster the Registered or Insured Article, the number of which appears on the face of this return receipt. 1. Henry Mello. 2. Leonilda Mello. Date of delivery June 5th, 1956.

EXHIBIT M

United States of America
National Labor Relations Board

SUBPENA

To: Maynard (Mac) Folden
414 James Street
Los Angeles, California

Request therefor having been duly made by E. Don Wilson, Counsel for General Counsel, National Labor Relations Board, whose address is 111 W. Seventh Street, Los Angeles, California,

You are hereby required and directed to appear before a Trial Examiner of the National Labor Relations Board, at Room 704, 111 West Seventh Street, in the City of Los Angeles, California, on the 11th day of June, 1956, at 10:00 o'clock a.m. of that day, to testify in the Matter of Lewis Food Company, et al. and Meat and Provision Drivers, Local Union No. 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers

of America, AFL-CIO, et al., Cases Nos. 21-CA-2061, 21-CA-2203, 21-CB-708.

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Los Angeles, California, this 4th day of June, 1956.

[Seal] Abe Murdock [30]

A-77954.

Received from the Postmaster the Registered or Insured Article, the number of which appears on the face of this return receipt. 1. Maynard Folden. 2. Billie Folden. Date of delivery 6-5-56. [31]

EXHIBIT N

United States of America
National Labor Relations Board

SUBPENA

To: Grammont Banville
7810 Osage Avenue
Los Angeles, California

Request therefor having been duly made by E. Don Wilson, Counsel for General Counsel, National Labor Relations Board, whose address is 111 W. Seventh Street, Los Angeles, California,

You are hereby required and directed to appear before a Trial Examiner of the National Labor Relations Board, at Room 704, 111 West Seventh Street, in the City of Los Angeles, California, on the 12th day of June, 1956, at 9:30 o'clock a.m. of that day, to testify in the Matter of Lewis Food

Company, et al. and Meat and Provision Drivers, Local Union No. 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, et al., Cases Nos. 21-CA-2061, 21-CA-2203, 21-CB-708.

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Los Angeles, California, this 5th day of June, 1956.

[Seal] Abe Murdock [32]

A-77961.

Received from the Postmaster the Registered or Insured Article, the number of which appears on the face of this return receipt. 1. Grammont Banville. 2. Mrs. Stella M. Banville. Date of delivery June 6, 1956. [32A]

EXHIBIT O

United States of America

National Labor Relations Board

SUBPENA

To: Joe Loera

1537 E. 90th Street

Los Angeles, California

Request therefor having been duly made by E. Don Wilson, Counsel for General Counsel, National Labor Relations Board, whose address is 111 W. Seventh Street, Los Angeles, California,

You are hereby required and directed to appear before a Trial Examiner of the National Labor

Relations Board, at Room 704, 111 West Seventh Street, in the City of Los Angeles, California, on the 11th day of June, 1956, at 10:00 o'clock a.m. of that day, to testify in the Matter of Lewis Food Company, et al. and Meat and Provision Drivers, Local Union No. 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, et al., Cases Nos. 21-CA-2961, 21-CA-2203, 21-CB-708.

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Los Angeles, California, this 4th day of June, 1956.

[Seal] Abe Murdock [33]

A-77955.

Received from the Postmaster the Registered or Insured Article, the number of which appears on the face of this return receipt. I. Ramona Leora. Date of delivery 6/5/56. [33A]

EXHIBIT P

United States of America
National Labor Relations Board

SUBPENA

To: Anastacio Holquin
530 S. Kern Street
Los Angeles, California

Request therefor having been duly made by E. Don Wilson, Counsel for General Counsel, National

Labor Relations Board, whose address is 111 W. Seventh Street, Los Angeles, California,

You are hereby required and directed to appear before a Trial Examiner of the National Labor Relations Board, at Room 704, 111 West Seventh Street, in the City of Los Angeles, California, on the 11th day of June, 1956, at 10:00 o'clock a.m. of that day, to testify in the Matter of Lewis Food Company, et al. and Meat and Provision Drivers, Local Union No. 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, et al., Cases Nos. 21-CA-2061, 21-CA-2203, 21-CB-708.

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Los Angeles, California, this 4th day of June, 1956.

[Seal] Abe Murdock [34]

A-77952.

Received from the Postmaster the Registered or Insured Article, the number of which appears on the face of this return receipt. I. Anastacio Holquin. Date of delivery. June 5, 1956. [34A]

EXHIBIT Q

United States of America
National Labor Relations Board

SUBPENA

To: William L. (Roy) Miller
6226 Henrilee Street
Lakewood, California

Request therefor having been duly made by E. Don Wilson, Counsel for General Counsel, National Labor Relations Board, whose address is 111 W. Seventh Street, Los Angeles, California,

You are hereby required and directed to appear before a Trial Examiner of the National Labor Relations Board, at Room 704, 111 West Seventh Street, in the City of Los Angeles, California, on the 11th day of June, 1956, at 10:00 o'clock a.m. of that day, to testify in the Matter of Lewis Food Company, et al. and Meat and Provision Drivers, Local Union No. 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, et al., Cases Nos. 21-CA-2061, 21-CA-2203, 21-CB-708.

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Los Angeles, California, this 4th day of June, 1956.

[Seal] Abe Murdock [35]

A-77951.

Received from the Postmaster the Registered or Insured Article, the number of which appears on

the face of this return receipt. 1. William L. Roy Miller. Date of delivery 6/5/56. [36]

EXHIBIT R

United States of America
National Labor Relations Board

SUBPENA

To: Otto Schubert
853 El Paso Drive
Los Angeles, California

Request therefor having been duly made by E. Don Wilson, Counsel for General Counsel, National Labor Relations Board, whose address is 111 W. Seventh Street, Los Angeles, California,

You are hereby required and directed to appear before a Trial Examiner of the National Labor Relations Board, at Room 704, 111 West Seventh Street, in the City of Los Angeles, California, on the 11th day of June, 1956, at 10:00 o'clock a.m. of that day, to testify in the Matter of Lewis Food Company, et al. and Meat and Provision Drivers, Local Union No. 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, et al., Cases Nos. 21-CA-20061, 21-CA-2203, 21-CB-708.

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Los Angeles, California, this 4th day of June, 1956.

A-77949.

[Seal] Abe Murdock [37]

Received from the Postmaster the Registered or Insured Article, the number of which appears on the face of this return receipt. 1. Mr. Otto Schubert. 2. Mrs. Margareta Schubert. Date of delivery June 5, 1956. [38]

EXHIBIT S

United States of America
National Labor Relations Board

SUBPENA

To: Walter O. Lisser
13513 Orange Avenue
Hollydale, California

Request therefor having been duly made by E. Don Wilson, Counsel for General Counsel, National Labor Relations Board, whose address is 111 W. Seventh Street, Los Angeles, California,

You are hereby required and directed to appear before a Trial Examiner of the National Labor Relations Board, at Room 704, 111 West Seventh Street, in the City of Los Angeles, California, on the 11th day of June, 1956, at 10:00 o'clock a.m. of that day, to testify in the Matter of Lewis Food Company, et al. and Meat and Provision Drivers, Local Union No. 626, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, et al., Cases Nos. 21-CA-2061, 21-CA-2203, 21-CB-708.

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the

undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Los Angeles, California, this 4th day of June, 1956.

[Seal] Abe Murdock [39]

A-77953.

Received from the Postmaster the Registered or Insured Article, the number of which appears on the face of this receipt. 1. Walter O. Lisser. 2. Beverly J. Lisser. Date of delivery. June 6, 1956. [40]

EXHIBIT T

United States of America
National Labor Relations Board

SUBPENA DUCES TECUM

To: Walter Schmidt, Secretary-Treasurer of Association of Independent Workers of America
c/o Lewis Food Company
793 E. 17th Street, Los Angeles 21, California

Request therefor having been duly made by E. Don Wilson, Counsel for General Counsel, National Labor Relations Board, whose address is 111 W. Seventh Street, Los Angeles, California,

You are hereby required and directed to appear before a Trial Examiner of the National Labor Relations Board, at Room 704, 111 West Seventh Street, in the City of Los Angeles, California, on the 11th day of June, 1956, at 10:00 o'clock a.m. of that day, to testify in the Matter of Lewis Food Company, et al. and Meat and Provision Drivers, Local Union No. 626, International Brotherhood of

Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO, et al., Cases Nos. 21-CA-2061, et al.

And you are hereby required to bring with you and produce at said time and place the following books, records, correspondence, and documents:

1. Minutes of general membership meetings held in 1952, 1953, 1954, 1955 and 1956.

2. Records showing who attended general membership meetings in 1952, 1953, 1954, 1955 and 1956.

3. Voting proxies from members of Association for annual Association meetings in 1952, 1953, 1954, 1955 and 1956.

4. Form or forms of application for membership in Association used in 1952, 1953, 1954, 1955 and 1956.

5. Form of request for deduction of initiation fee and dues for years 1952, 1953, 1954, 1955 and 1956.

6. Records of membership of Association for years 1952, 1953, 1954, 1955 and 1956.

7. Financial statements of Association for 1952, 1953, 1954, 1955 and 1956.

8. Original of Bylaws of Association of Independent Workers adopted on or about February 19, 1956.

9. Original of Constitution of Association of Independent Workers of America adopted on or about February 19, 1956.

10. Original of Constitution of "Association of Food Handlers (formerly Association of Pet Food Manufacturers Employees)," copy of which was

submitted to the National Labor Relations Board on or about February 10, 1955, and allegedly signed on January 24, 1952.

11. Copy of Association receipt to Jose Flores for approximately $5.25, dated on or about July 26, 1954.

12. Copy of Association receipt to DeWitt Chapman, dated on or about March 23, 1955, for approximately $12.75.

13. Copy of Association receipt to John J. Charles, dated on or about March 23, 1955, for approximately $12.75.

14. Applications for membership in the Association and requests for deduction of initiation fees and dues signed by Walter Gorablenkow, DeWitt Chapman, John Charles, James Aitken, Daniel Turk, Ivan Maier and Otto Roth in or about February or March 1955, and application for membership and request for deduction of dues signed by Jose Flores in 1954.

15. All Association records showing the names of the Shop Stewards for the Association during the years 1952, 1953, 1954, 1955 and 1956. [42]

In testimony whereof, the seal of the National Labor Relations Board is affixed hereto, and the undersigned, a member of said National Labor Relations Board, has hereunto set his hand at Los Angeles, California, this 1st day of June, 1956.

[Seal] Abe Murdock [41]

B-28668.

Received from the Postmaster the Registered or Insured Article, the number of which appears on

the face of this return receipt. 1. Walter Schmidt. 2. H. W. Lewis. Date of delivery June 2, 1956. [43]

EXHIBIT U

[Title of Board and Causes.]

PETITION TO REVOKE SUBPOENA DUCES TECUM

To: The National Labor Relations Board:

Now comes D. B. Lewis, purportedly subject to subpoena duces tecum No. B-28669, by his attorneys, Hill, Farrer & Burrill, Ray L. Jolfinson, Jr. and William H. Wilson, appearing specially for the purpose of this petition only and only for the purpose of objecting to the jurisdiction of the Board and confining this appearance solely to the question of the validity of said subpoena and to the question of the jurisdiction of the Board, and petitions the [44] Board to revoke, set aside and quash the alleged or pretended service of the foregoing subpoena, which said subpoena purports to have been signed and issued by "Abe Murdock" at the purported request of E. Don Wilson, counsel for General Counsel, National Labor Relations Board. A copy of said purported subpoena duces tecum is attached hereto and incorporated herein as though fully set forth.

Said petition to revoke subpoena duces tecum is made upon the following grounds:

1. The subpoena duces tecum is void as not having been issued by the Board or a member thereof

in compliance with Section 11 of the Act; and Section 2634.01 of the Regulations authorizing the Regional Director or a hearing officer to issue subpoenas is void as being in excess of, and contrary to, the powers granted to the Board under the Act.

2. No proper application for the same was made under the rules and regulations of the Board in that counsel for the General Counsel requested the Regional Director to issue the subpoena duces tecum and that counsel for the General Counsel is not a "party", authorized to request subpoenas duces tecum either by the Act or the regulations.

3. There is no showing that the evidence whose production is required, relates to any matter in question in the instant proceedings.

4. The entire proposed action complained against constitutes a general, roving, exploratory search or fishing expedition, contrary to the provisions of the Fourth and Fifth Amendments of the United States Constitution.

This petition is supported by, and based upon, the [45] records and files herein and upon this petition.

Dated: June 7th, 1956.

HILL, FARRER & BURRILL
and
WILLIAM H. WILSON
/s/ By RAY L. JOHNSON, JR.
Attorneys for Petitioner [46]

[Subpena Duces Tecum attached is set out as Exhibit K at pages 30-32.]

EXHIBIT V

[Title of Board and Causes.]

PETITION TO REVOKE SUBPOENAS.

To: The National Labor Relations Board:

Now come Henry Mello, purportedly subject to subpoena No. A-77950, Maynard Folden, purportedly subject to subpoena No. A-77954, and Gramemont Banville, purportedly subject to subpoena No. A-77961, by their attorneys, Hill, Farrer & Burrill, Ray L. Johnson, Jr., and William H. Wilson, appearing specially for the purpose of this petition only and only for the purpose of objecting to the jurisdiction of the Board and confining their appearances solely to the question of the validity of said subpoenas and to the question of the [50] jurisdiction of the Board, and petition the Board to revoke, set aside and quash the alleged or pretended service of the foregoing subpoenas, which said subpoenas purport to have been signed and issued by "Abe Murdock" at the purported request of E. Don Wilson, counsel for General Counsel, National Labor Relations Board. A copy of each of said purported subpoenas is attached hereto and incorporated herein as though fully set forth.

Said petition to revoke subpoenas is made upon the following grounds:

1. The subpoenas are void as not having been issued by the Board or a member thereof in compliance with Section 11 of the Act; and Section 203.4.01 of the Regulations authorizing the Regional Director or a hearing officer to issue subpoenas is

void as being in excess of, and contrary to, the powers granted by the Board under the Act.

2. No proper application for the same was made under the rules and regulations of the Board in that counsel for the General Counsel requested the Regional Director to issue the subpoenas and that counsel for the General Counsel is not a "party", authorized to request subpoenas either by the Act or the regulations.

This petition is supported by, and based upon, the records and files herein and upon this petition.

Dated: June 8, 1956.

HILL, FARRER & BURRILL
and
WILLIAM H. WILSON
/s/ By RAY L. JOHNSON, JR.
Attorneys for Petitioner [51]

[Subpoenas attached are set out as follows: Henry Mello as Exhibit L at pages 32-33; Maynard (Mac) Folden as Exhibit M at pages 33-34; Grammont Banville as Exhibit N at pages 34-35.]

EXHIBIT W

[Title of Board and Causes.]

PETITION TO REVOKE SUBPOENA DUCES TECUM

To: The National Labor Relations Board:

Comes now Walter Schmidt, supposedly subject to subpoena duces tecum No. B-28668, by his attorney, Alva C. Baird, appearing specially for the

purpose of this petition only and only for the purpose of objecting to the jurisdiction of the Board and confining this appearance solely to the question of the validity of said subpoena and to the question of the jurisdiction of the Board, and petitions the Board to revoke, set aside and quash the alleged service of the forementioned subpoena, which said subpoena allegedly is signed and issued by [58] "Abe Murdock" at the purported request of E. Don Wilson, counsel for General Counsel, National Labor Relations Board. A copy of said purported subpoena duces tecum is attached hereto and incorporated herein as though fully set forth.

Said petition to revoke subpoena duces tecum is made upon the following grounds:

1. The subpoena duces tecum is void as not having been issued by the Board or a member thereof in compliance with Section 11 of the Act; and Section 102.58 of the Regulations authorizing the Regional Director or a hearing officer to issue subpoenas is void as being in excess of, and contrary to, the powers granted to the Board under the Act.

2. There is no showing or allegation that the evidence whose production is required, relates in any matter whatsoever in question in the instant proceedings.

3. The subpoena duces tecum attached hereto is a general, exploratory search, general in nature and contrary to the provisions of the Fourth and Fifth Amendments of the United States Constitution. Federal Trade Commission v. American Tobacco Company, 264 US 298, 306.

4. That there was no proper application for said subpoena duces tecum under the Rules and Regulations of the Board and that counsel for the General Counsel requested the Regional Director to issue said subpoena duces tecum and that counsel for the General Counsel is not a "party", authorized to request subpoenas duces tecum either by the Act or the Regulations. N.L.R.B. v. Pesante, 119 F. Supp. 444.

This petition is supported by and based upon, the records and files herein, this petition, and the cited Act, Regulations and points and authorities.

Dated: June 8, 1956.

LAW OFFICES, ALVA C. BAIRD
/s/ By G. A. SHEPPARD
Attorneys for the Association

[Subpena attached, Walter Schmidt, is set out as Exhibit T at pages 41-44.]

EXHIBIT X

[Title of Board and Causes.]

PETITION TO REVOKE SUBPOENAS

To: The National Labor Relations Board:

Come now Joe Loera, Anastacio Holquin, William L. (Roy) Miller, Otto Schubert and Walter O. Lisser, all supposedly subject to subpoena Nos. A-77955, A-77952, A-77951, A-77949 and A-77953 respectively, by their attorney, Alva C. Baird, appearing specially for the purpose of this petition only and only for the purpose of objecting to the

jurisdiction of the Board and confining this appearance solely to the question of the validity of said subpoenas and to the question of the jurisdiction [63] of the Board, and petition the Board to revoke, set aside and quash the alleged service of the aforementioned subpoenas, which said subpoenas allegedly are signed and issued by "Abe Murdock" at the purported request of E. Don Wilson, counsel for General Counsel, National Labor Relations Board. Copies of said purported subpoenas are attached hereto and incorporated herein as though fully set forth.

Said petition to revoke subpoenas is made upon the following grounds:

1. The subpoenas and each and every one of them, are void as not having been issued by the Board or a member thereof in compliance with Section 11 of the Act; and Section 102.58 of the Regulations authorizing the Regional Director or a hearing officer to issue subpoenas is void as being in excess of, and contrary to, the powers granted to the Board under the Act.

2. That there was no proper application for said subpoenas, or any one of them, under the Rules and Regulations of the Board, and that counsel for the General Counsel requested the Regional Director to issue said subpoenas and that counsel for the General Counsel is not a "party", authorized to request subpoenas either by the Act or the Regulations. N.L.R.B. v. Pesante, 119 F. Supp. 444.

This petition is supported by and based upon,

the records and files herein, this petition, and the cited Act, Regulations and points and authorities.

Dated: June 8, 1956.

LAW OFFICES, ALVA C. BAIRD
/s/ By G. A. SHEPPARD
Attorneys for the Association

[Subpenas attached are set out as follows: Joe Loera as Exhibit O at pages 35-36; Anastacio Holquin as Exhibit P at pages 36-37; William L. (Roy) Miller as Exhibit Q at pages 38-39; Otto Schubert as Exhibit R at pages 39-40; Walter O. Lisser as Exhibit S at pages 40-41.]

EXHIBIT Y

[Title of Board and Causes.]

ORDER

Petitions to Revoke Subpenas having been filed with the undersigned on June 11, 1956, by Henry Mello, Maynard Folden, Grammont Banvill and D. B. Lewis,

It is hereby ordered that the same be and it hereby is referred to the Trial Examiner conducting this consolidated hearing, National Labor Relations Board, for a ruling.

Dated at Los Angeles, California, this 11th day of June, 1956.

[Seal] /s/ HENRY W. BECKER
Regional Director, National Labor Relations Board,
Twenty-First Region. [75]

EXHIBIT Z

[Title of Board and Causes.]

ORDER

Petitions to Revoke Subpoenas having been filed with the undersigned on June 11, 1956, by Joe Loera, Anastacio Holquin, William L. (Roy) Miller, Otto Schubert, Walter O. Lisser and Walter Schmidt,

It is hereby ordered that the same be and they are hereby referred to the Trial Examiner conducting this consolidated hearing, National Labor Relations Board, for a ruling.

Dated at Los Angeles, California, this 11th day of June 1956.

[Seal] /s/ HENRY W. BECKER
Regional Director, National Labor Relations Board,
Twenty-First Region. [76]

EXHIBIT AA

AN EXCERPT FROM TRANSCRIPT OF HEARING IN CASES NUMBERS 21-CA-2061, 21-CA-2203 AND 21-CB-708 BEFORE TRIAL EXAMINER WALLACE ROYSTER OF SAN FRANCISCO, CALIFORNIA

Proceedings on June 11, 1956

Mr. E. Wilson: Sir, may I have marked for identification as General Counsel's exhibit 1-PP a letter dated June 8, 1956, addressed to the National

Labor Relations Board, attention of Mr. Henry Becker, Regional Director, enclosing a so-called new petition to revoke subpoenas in the case of Henry Mello, Maynard Folden, and Grammont Banville, in which counsel states that through inadvertence, the first petition prepared and served referred to subpoenas duces tecum rather than to subpoenas, and pointing out that that mistake or inadvertence had been corrected in the petition.

Attached to that letter, if this will meet the convenience of the parties and the Trial Examiner, and forming a part of this exhibit—if it does not meet the convenience of the parties, I can make these separate—is a petition to revoke subpoenas filed by Ray L. Johnson, Jr. for Hill, Farrer & Burrill and William H. Wilson, dated June 8, 1956, apparently in behalf of Henry Mello, Maynard Folden, and Grammont Banville.

Further attached is a petition to revoke subpoenas duces tecum filed by Ray L. Johnson, Jr. for Hill, Farrer & Burrill and William H. Wilson. This petition being filed on behalf of D. B. Lewis.

There is further attached a petition to revoke subpoenas duces tecum filed by Ray L. Johnson, Jr. on behalf of Hill, Farrer & Burrill and William H. Wilson on behalf of Henry Mello, Maynard Folden, and Grammont Banville, being my understanding that this is the particular petition that counsel states was filed through inadvertence.

(The document referred to was marked as General Counsel exhibit 1-PP for identification.)

Mr. E. Wilson: As General Counsel's exhibit 1-QQ for identification, an order of Regional Director Henry W. Becker, dated June 11, 1956, referring to this Trial Examiner the petitions to revoke subpoenas which have been referred to as being a part of General Counsel's exhibit 1-PP for identification. [77]

(The document referred to was marked as General Counsel exhibit 1-QQ for identification.)

Mr. E. Wilson: I now offer General Counsel's exhibit 1-PP for identification and 1-QQ for identification in evidence.

Mr. Johnson: No objection.

Mr. Sheppard: I have no objection.

Trial Examiner: The exhibits are received.

(The documents heretofore marked as General Counsel's exhibits 1-QQ and 1-PP were received in evidence.)

Mr. Hackler: A question of information. Do I understand the practice still to be the disposition of the motion is done ex party on the record?

Trial Examiner: They certainly may be done ex party, and I suppose that is the usual fashion. They may become a part of the record upon the motion of any party.

Mr. Johnson: I so move.

Trial Examiner: We will have it on the record.

Mr. E. Wilson: Of course, Mr. Trial Examiner, I am not suggesting that arguments with respect to these petitions must be on the record. I don't

care which way. I believe that those last two exhibits have been received.

Trial Examiner: Yes, they have. Is there any particular point or ruling on them at this moment? Would it serve the purposes of the parties in any respect to rule on them immediately?

Mr. E. Wilson: Yes. If I may point out to the Trial Examiner, on June 7, 1956, I wrote a letter to Mr. Johnson stating that I had caused subpoenas to be served on various employees of Lewis Food Company, many of which were returnable as the same day and hour, that being this morning, June 11th at 10 o'clock, pointing out that obviously that all of them couldn't testify. That it wasn't my desire to cause so many of the Company's personnel to be away from the plant simultaneously and suggesting that arrangements be made for those who had been subpoenaed to appear at such time as the testimony was to be taken. [78]

I advised Mr. Johnson in this letter that it was my intention to call Mr. D. B. Lewis and Mr. Schmidt as my first witnesses, and that I should endeavor to call the others in such an order as not seriously to inconvenience Lewis Food Company.

I expressed the opinion that Mr. Johnson's cooperation would be very helpful.

I now call Mr. D. B. Lewis as my first witness.

I look around and see that Mr. D. B. Lewis is not here. That is a petition to revoke his subpoena. I would like to have that ruled on, sir.

Trial Examiner: We will be off the record while I look over the subpoenas and the motions.

Mr. Johnson: I have prepared points and authorities, Mr. Royster.

Trial Examiner: I will ask you for them, then.

Mr. Johnson: I don't know whether you want them on the record.

Trial Examiner: Let's have it right now.

Mr. E. Wilson: I assure you I am not arguing the matter at this time since I know you have not observed the subpoenas, but so that you will know some of the matter that at least I shall address myself to.

One will be timeliness of the petition. I believe that more than five days had passed since service of the subpoena duces tecum upon D. B. Lewis. Service was effected on June 2, 1956. The petition to revoke was not received until today.

Mr. Johnson: It was mailed Friday, Mr. Trial Examiner, and in the ordinary course of the mail from five blocks, it should have been received on Saturday, which was timely enough.

Mr. E. Wilson: I simply call that to your attention, sir, as something I shall expect to argue.

Mr. Sheppard: Mr. Trial Examiner, may I check outside the office to see if these petitions are filed.

Trial Examiner: We shall be off the record now.

Mr. Johnson: Any issue about the mailing, I will call my secretary over here to testify. [79]

Mr. E. Wilson: I will not dispute that they were mailed sometime on Friday.

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

I have read the petition to revoke subpoenas, the memorandum of points and authorities in support thereof, and the decision of Judge Paul in the Federal District Court down here, which bears on the point.

Mr. Johnson: Mr. Trial Examiner, I don't mean to interrupt but I want, before you make a ruling, to protect myself, and I want to object to, as you probably noticed, your jurisdiction to rule on our petition to revoke.

Mr. Sheppard: Same objection from the Association.

Trial Examiner: Very well. I have also, of course, referred to the Rules and Regulations of the National Labor Relations Board, and until the Rules and Regulations of the National Labor Relations Board are changed, why, of course, I propose to follow them.

The memorandum and the petition points out what I believe to be a fact, that nowhere in the definition of a party is the term or the designation "General Counsel" set forth.

I recognize, however, that the General Counsel has been traditionally in these hearings been given the status of a party. He is, in my opinion, one who fulfills all the criteria, satisfies all of the criteria that might be applied to a situation where one is trying to determine who is a party, and I will rule that he is a party.

Following the Rules and Regulations, with a bow to Mr. Johnson and the very cogent arguments

that he has presented, no matter how persuasive I may find them, I will still follow the Rules and Regulations.

I deny the motion to quash as to the subpoenas ad testificandum.

As to the one addressed to Mr. Lewis towards the production of documents, I want a little further information. I suppose that at a minimum, the first thing I should do is examine the complaint which I have not yet done, and if no apparent connection between the request to produce contained in the [80] subpoena duces tecum, between that request and the complaint is there, then I shall ask for an explanation as to the relevancy between what is requested to be produced and the allegations in the complaint.

Mr. E. Wilson: Mr. Trial Examiner, it may well be, if you were to follow my thinking in connection with this petition to revoke on behalf of D. B. Lewis, that it would not even be necessary for you to reach the question of relevancy in view of the fact that it is my position that the petition is untimely, the petition to revoke.

Trial Examiner: When do you say the subpoena was served?

Mr. E. Wilson: The subpoena was served, and I have here the subpoena or copy, together with the post office return receipt. The post office return receipt shows the date of delivery as June 2, 1956.

I point out, of course, that this is June 11th. That it was received today, nine days after service.

I point out that Section 102.31 of the Rules pro-

vides that any person subpoened, if he does not intend to comply with the subpoena, shall, within five days after the date of service of the subpoena upon him, petition in writing to revoke the subpoena. All petitions to revoke subpoena shall be served on the party at whose request the subpoena was issued. Such petition to revoke, if made prior to the hearing, shall be filed with the Regional Director,—mentally and am attempting verbally to underscore "filed with the Regional Director"—and the Regional Director shall refer the petition to the Trial Examiner of the Board for ruling.

It also continues "that petitions to revoke subpoenas filed during the hearing shall be filed with the Trial Examiner."

We are not talking about putting something into the mail. We are talking about filing. The petition to revoke a subpoena should be filed, that is, be served and be here either with the Regional Director or with the Trial Examiner if the case has begun hearing, within five days after the date of service, without regard to any question of intervening Saturdays or Sundays. More than five days elapsed from the date of service of the subpoena before the subpoena was filed. [81]

Trial Examiner: The date of service was on a Saturday.

Mr. E. Wilson: On a Saturday, yes, sir.

Trial Examiner: When was the petition received to revoke?

Mr. E. Wilson: This morning.

Mr. Sheppard: Mr. Trial Examiner, might I interject a moment here. I note what I mentioned before, that the petition for revoking have come in the mail, so when you are reviewing, you will be reviewing the same, but if you do have the copy of the new Rules and Regulations, I think 192.81, 82, and 83 answers that argument exactly on the head, according to the wordage there.

You don't count Sundays when you have a limit less than seven days. I think that will be an answer to that.

Mr. E. Wilson: Let's eliminate the Sundays, if you wish. I am talking now for the purpose of arguing. I am not conceding that the Rules so require. I am saying that service effectuated before Monday—which would have been the 4th—the 4th, 5th, 6th, 7th—the 8th was Friday. No later than the 8th; under any circumstances, this petition to revoke should have been filed with the Regional Director. It was not filed with the Regional Director. It is untimely.

Trial Examiner: I am not sure that I go along with you on that. It is true that the subpoena was received on a Saturday. Whether received by Mr. Lewis personally on that date, I don't know. Does your card show?

Mr. E. Wilson: It shows that it was received or signed for. There is the name, the addressee, printed, D. B. Lewis; on the second line, the addressee's agent, H. W. Lewis.

I think it may well be stipulated here for the

purposes of this record at this time that Mr. H. W. Lewis is an officer of Lewis Food Company.

Mr. W. Wilson: So far as I know, he is not.

Trial Examiner: In any event, it was received at his business address.

Mr. E. Wilson: Yes, by his brother.

Mr. Johnson: May I refer the Trial Examiner to Section 102.83 of the Rules, which adds three days to a period in which to do things if a notice was served by mail. [82]

Mr. Sheppard: And excludes Sundays.

Mr. Johnson: And excludes Sundays, and today is only the eighth day.

Trial Examiner: I don't see how you can say that the day of service was earlier than June the 4th.

Mr. E. Wilson: I say it was earlier than that because of the fact that it was received on June 2nd.

Trial Examiner: Yes. It was received on a Saturday, but Rule 102.83 says that for the purpose of this section, a Saturday on which the Board's offices are not open for business shall be considered as a holiday.

Now then, if you assume that the service was effective on the 4th, the day of service is not counted. The fifth day would not be until today, until the expiration of it.

I will rule that the petition to revoke has been filed timely.

Do I have a copy of the complaint in this file?

Mr. E. Wilson: Yes, sir. May I locate it for you. I realize you have a great many papers.

May I point out, sir, that you may desire to look at the bill of particulars which was furnished in connection with the complaint as well.

Trial Examiner: All right.

Mr. E. Wilson: At such time as you want to, I will locate that for you.

Trial Examiner: Let's start with number 1 on attachment B to the subpoena duces tecum, served on Mr. Lewis. How does that relate to the complaint, Mr. Wilson?

Mr. E. Wilson: As the Trial Examiner is now aware, there is a charge of violation of section 8A2 by this employer. There are a number of "employees" that General Counsel considers to be supervisors who are officers or active in behalf of the Association. Evidence of supervisory authority would be termination of employees on the recommendation of such people. That is what 1, 2, and 3 relate to. General Counsel believes that the termination notices will contain the names of certain people as recommending—having recommended discharges which were effectuated. [83]

General Counsel will then go on to prove that such people were either officers of this allegedly dominated Association or were active in behalf of the Association, so that would account for 1, 2, and 3.

Trial Examiner: As to 4, I believe you have alleged that Mr. Chapman, Charles and Roth, that deductions from pay were made for dues to the Association before the expiration of any thirty day period.

Mr. E. Wilson: That is correct, sir.

Trial Examiner: What about the others you have named in there?

Mr. E. Wilson: General Counsel has reason to believe that the same is true of the others, and believes that the records which have been particularized there will show that to be the fact.

Trial Examiner: Have you at any time in the complaint or any bill of particulars set forth that it was by such conduct in respect to Gorablenkow, Turk, Aitken, and Maier, that a violation of Section 8A2 was accomplished?

Mr. E. Wilson: I have not particularized the complaint to include those names. I have stated, however, in the complaint that the employer has interfered with, assisted illegally, dominated in the Association. This would be evidence if, in fact, the Employer did deduct such dues, initiation fees, prior to the 30 days, that would be evidence of that assistance, domination.

Trial Examiner: In paragraph 5, you repeat those seven names, and add that of Jose Flores as to applications for employment. What aspect of the complaint do you consider will be supported?

Mr. E. Wilson: Again, the 8A2 allegations will be supported by these. I don't feel, sire, that I am being called upon to spell out in detail, as it may make an offer of proof of all I expect to prove.

I can in general state that there will be evidence. I will expect that there will be evidence, with respect to Jose Flores just as with those other named persons. That within less than thirty days after

they were employed, they were required to pay initiation fees and dues.

Trial Examiner: But this requires more than the evidence showing the date of employment. This is the application for employment presumably made by these individuals. [84]

Mr. E. Wilson: The applications for employment I have reason to believe will also have marked on there the date that they commenced employment. In any event, if the deductions were made in fact within even less than thirty days after they applied for work, let alone went to work, I think it should be obvious what the results were.

Trial Examiner: Is any more than four, except for the addition of the name, Jose Flores?

Mr. E. Wilson: You will have to let me have a moment, sir. I know I had something in mind, of course, when I made the distinction between those.

Mr. Johnson: Maybe I can help you.

It is your position, I take it, that in one case, it is an application for employment. That may not be the same thing, the same time that they began working.

Mr. E. Wilson: Exactly. That is true.

Trial Examiner: But the day they went to work is the date that interests you, isn't that so?

Mr. E. Wilson: It could well be that the day of application for employment—for example, sir, supposing that the evidence—and I believe the evidence will be forthcoming—that indeed before employees actually started working, they were re-

quired to sign applications for membership in the union, and to sign check-off cards for initiation fees and dues deduction.

Trial Examiner: That is what you expect out of paragraph 5.

Mr. E. Wilson: Yes. I expect to have those dates established.

Trial Examiner: Is 6 different in any respect from 1, 2, 3 for any purpose?

Mr. E. Wilson: No, sir.

Trial Examiner: All right. Do you have anything further to say before I rule on this duces tecum.

Mr. Johnson: Yes, Mr. Trial Examiner.

In connection with 4 and 5, those persons other than Chapman, Charles and Roth, we ask for a Bill of Particulars in connection with paragraphs 9 and 10 on conclusions of law that we dominated, assisted, and controlled the union, [85] and in connection with the Bill of Particulars which the Trial Examiner ruled on, counsel only gave us the additional names of Chapman and Charles, and I say therefore, in view of the fact that we have had a Bill of Particulars, it cannot now come in and support these other individuals on the basis of a shot gun allegation that we have dominated, controlled, assisted the Association.

Since there has been no specification of those individuals by name in the Bill of Particulars, we submit that their dates of employment and the dates of when their dues and initiation fees were deducted is outside the issues framed.

Mr. E. Wilson: I submit, of course, sir, that those events with respect to those particular individuals would merely be evidence of the general pattern of active participation by management through its officers and agents in directing, management controlling the affairs, activities, and policies of the Association.

It may well be, Mr. Trial Examiner, that the evidence, when it is developed here, will show that a plant with anywhere from 150 to 200 employees regularly employed, with a tremendous turnover, that hundreds of employees have, in fact, been required to sign applications for union membership and dues deduction and, in fact, have been caused to make such payments earlier than thirty days after their employment against their will.

This not a matter of alleging each one of those tickets is a separate violation, but that is part of the activity of the employer which has been alleged by counsel for General Counsel satisfactorily to Trial Examiner Herman Marx, and bring to your attention at this time, sir, the fact that I will endeavor to make it a part of the record that we received this morning at 11:30 a.m. a teletype from the Executive Secretary of the Board that the Respondent Employer's request for special permission to appeal to the Board from Trial Examiner Marx' ruling on the second motion was hereby denied.

Trial Examiner: In compliance with the ruling of Trial Examiner Marx, you supplied the names of DeWitt Chapman and John Charles, is that cor-

rect, as persons who were required to pay dues before the thirty day period had expired. [86]

Mr. E. Wilson: On the ruling of Trial Examiner Marx, sir, he did not order me to supply the names of anybody who was discriminated against in such fashion. Trial Examiner Herman Marx directed me to supply in terms of ultimate fact the manner in which the Employer dominated, interfered with, and, so forth, the Association. That is what I did in my Bill of Particulars.

When I gave those names, what I was particularly doing was pointing out particular instances of discrimination, whether it would be under 8A2 or not.

I am not going to resist this to this extent, sir. So long as it is understood that I am not thereby limiting myself, to the extent that I am now able, I will supply the names that have just been called for and state that they were discriminated against in the same fashion during the years 1954 and 1955. I do not thereby intend to limit myself to developing throughout the course of this trial the fact that others may well have been discriminated against.

Trial Examiner: Whose names you do not now have.

Mr. E. Wilson: I do not at this time, no, sir.

Trial Examiner: All right. Is your Bill of Particulars then expanded to include the names of individuals other than those already given in the Bill of Particulars or in the complaint, the names appearing in paragraphs 4 and 5 of the attachment?

Mr. E. Wilson: May I look at it, sir.

Mr. Johnson: I can state for the record, as far as I am concerned, from the 18th until the 15th of July, any date is all right with me.

Trial Examiner: All right. I hear no objection to the continuance, and the hearing is continued, and the circumstances as set by the motion.

(Whereupon, at 2:08 p.m. the hearing in this matter was continued indefinitely.) [95]

Duly Verified.

[Endorsed]: Filed June 29, 1956. [96]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

The National Labor Relations Board, hereinafter called the Board, by its General Counsel and by Daniel J. Harrington, its Chief Law Officer for the Twenty-First Region, having filed its application for an order requiring Respondents D. B. Lewis, President, Lewis Food Company; Henry Mello; Maynard (Mac) Folden; Grammont Banville; Joe Locra; Anastacio Holquin; William L. (Roy) Miller; Otto Schubert; Walter O. Lisser; and Walter Schmidt, Secretary-Treasurer of Association of Independent Workers of America, to obey and comply with certain subpoenas ad testificandum and duces tecum duly and properly served upon said Respondents as set forth in said application and good cause appearing therefor, it is hereby

Ordered that Respondents D. B. Lewis, President, Lewis Food [97] Company; Henry Mello;

Maynard (Mac) Folden; Grammont Banville; Joe Loera; Anastacio Holquin; William L. (Roy) Miller; Otto Schubert; Walter O. Lisser; and Walter Schmidt, Secretary-Treasurer of Association of Independent Workers of America, appear and show cause, if any there be, before this Court at Los Angeles, California, on the 9th day of July, 1956, at two o'clock in the afternoon of that day as soon thereafter as counsel can be heard why an order of this Court should not issue directing Respondents Henry Mello, Maynard (Mac) Folden, Grammont Banville, Joe Loera, Anastacio Holquin, William L. (Roy) Miller, Otto Schubert and Walter O. Lisser to appear before Wallace Royster, the Trial Examiner designated by the Board in Cases Nos. 21-CA-2061, 21-CA-2203 and 21-CB-708, pending before said Board, at such time and place as said Trial Examiner may designate and there give testimony and answer any and all questions which may be propounded to them in connection with the matters under investigation and in question in said proceedings before the Board, and further directing that Respondents D. B. Lewis, President of Lewis Food Company, and Walter Schmidt, Secretary-Treasurer of Association of Independent Workers of America, appear before Wallace Royster, the Trial Examiner designated by the Board in Cases Nos. 21-CA-2061, 21-CA-2203 and 21-CB-708, pending before said Board, at such time and place as said Trial Examiner may designate and there and then testify and answer any and all questions which may be propounded to them in connection with the

proceedings before the Board and, in addition, to then and there produce the books, papers, records and documents described in the subpoenas duces tecum served upon them, and further directing that the costs of this proceeding be taxed and adjudged against Respondents, together with such other sum as will reasonably compensate the National Labor Relations Board as an agency of the United States Government for the expenses and costs actually incurred in connection with the prosecution of this proceeding to compel obedience to subpoenas of the National Labor Relations Board, and [98]

It Is Further Ordered that service of this order, together with a copy of the application on which it is issued, be made by a United States Marshal upon Respondents D. R. Lewis, President, Lewis Food Company; Henry Mello; Maynard (Mae) Folden; Grammont Banville; Joe Loera; Anastacio Holquin; William L. (Roy) Miller; Otto Schubert; Walter O. Lisser; and Walter Schmidt, Secretary-Treasurer of Association of Independent Workers of America, in any manner provided in the Rules of Civil Procedure for the District Courts of the United States, or by registered mail, and that proof of service be filed herein by the United States Marshal.

Issued at Los Angeles, California, this 29th day of June, 1956, at 12 m.

/s/ PAUL J. McCORMICK,
United States District Judge.

Presented by Daniel J. Harrington, Chief Law Officer, E. Don Wilson, Attorney. [99].

[Endorsed]: Filed June 29, 1956.

In the United States District Court, Southern District of California, Central Division

Civil No. 20119-TC

NATIONAL LABOR RELATIONS BOARD,
Applicant,

v.

D. B. LEWIS, PRESIDENT, LEWIS FOOD COMPANY; HENRY MELLO; MAYNARD (MAC) FOLDEN; GRAMMONT BANVILLE; JOE LOERA; ANASTACIO HOLQUIN; WILLIAM L. (ROY) MILLER; OTTO SCHUBERT; WALTER O. LISSER; AND WALTER SCHMIDT, SECRETARY-TREASURER OF ASSOCIATION OF INDEPENDENT WORKERS OF AMERICA,
Respondents.

ORDER

The above-entitled cause came on for hearing on the 9th day of July 1956, before Honorable United States District Judge Thurmond Clarke, upon the application of the National Labor Relations Board for an order requiring the Respondents to obey certain subpenas served upon the Respondents.

The cause was argued and points and authorities were submitted. The Court, having considered the evidence and being fully advised in the premises, has heretofore, on July 16, 1956, filed a minute order, denying the Applicant's request for an Order requiring obedience to subpenas.

Now, Therefore, It Is Ordered, Adjudged and Decreed that the Order [100] requested by Applicant, requiring obedience to subpenas by the Respondents, is denied. See National Labor Relations vs. Pesante, 119 F. Supp. 444.

Dated: July 30, 1956.

/s/ THURMOND CLARKE,
United States District Judge [101]

[Endorsed]: Lodged July 24, 1956. Filed July 30, 1956.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the National Labor Relations Board, appellant in the above case, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of this Court entered on July 30, 1956, refusing to enforce subpenas in the above-captioned proceeding.

Dated at Washington, D. C., this 16th day of August, 1956.

/s/ MARCEL MALLET-PREVOST,
Assistant General Counsel, National Labor Relations Board [102]

[Endorsed]: Filed Aug. 20, 1956.

Trial Examiner: To the subpoena duces tecum.

Mr. E. Wilson: Yes, sir.

Trial Examiner: Very well. Anything further, Mr. Johnson?

Mr. Johnson: No, I don't believe so, Mr. Examiner. At least in this connection.

Trial Examiner: I will deny the motion.

Mr. E. Wilson: Mr. Trial Examiner, I am marking as General Counsel's Exhibit 1-RR for identification a teletype from the Executive Secretary of the Board to Regional Director Becker stating that Respondent Employer's request for special permission to appeal to the Board on the second motion of Bill of Particulars is denied. [87]

(The document referred to was marked as General Counsel's Exhibit 1-RR for identification.)

Mr. E. Wilson: I offer General Counsel's Exhibit 1-RR for identification in evidence.

Mr. Johnson: I will make the objection that we haven't been served with such notice.

Trial Examiner: All right. I will overrule the objection, and if, before the end of the hearing, you don't have a copy of that, I will reconsider that.

The document is received.

(The document heretofore marked as General Counsel's Exhibit 1-RR for identification was received in evidence.)

Trial Examiner: It is a few minutes after 12. What is your situation?

Mr. E. Wilson: First, I think I should like to

[Title of District Court and Cause.]

CERTIFICATE BY CLERK

I, John A. Childress, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered 1 to 104, inclusive, contain the original

Application for Order Requiring Obedience to Subpenas Ad Testificandum and Duces Tecum;

Order to Show Cause;

Order;

Notice of Appeal;

Designation of Contents of Record on Appeal; all in the above-entitled case and constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit in the above case.

I further certify that my fees for preparing the foregoing record amount to $2.00, which sum has not been paid by appellant.

Witness my hand and seal of the said District Court this 28th day of September, 1956.

[Seal] JOHN A. CHILDRESS,
Clerk,
/s/ By CHARLES E. JONES,
Deputy

have, for the purposes of the record, something else introduced into evidence.

(The document referred to was marked as General Counsel's Exhibit 1-SS for identification.)

Mr. E. Wilson: I have had marked for identification as General Counsel's exhibit 1-SS, a copy of a letter written by me to Mr. Johnson on June 7, 1956, to which reference previously was made in a statement.

I offer General Counsel's Exhibit 1-SS in evidence.

Mr. Johnson: I object on the ground of materiality.

Trial Examiner: Since no contention is made that the subpoena is unduly oppressive in its requirement that certain individuals be here at a stated hour, I will reject the offer.

(The document heretofore marked as General Counsel's Exhibit 1-SS for identification was rejected.)

Mr. E. Wilson: May I point out, Mr. Trial Examiner, and I intend to make an inquiry of Mr. Johnson. I subpoenaed a Mr. Schubert, who is an employee of Lewis Food Company, to be here this morning at 10 o'clock. The same for Mr. Mello, Mr. Miller, Mr. Holguin, Mr. Lisser, Mr. Folden, Mr. Loera, as well as Mr. Schmidt and Mr. D. B. Lewis.

As the Trial Examiner can see, although you might not be able to tell, the fact is that none of those witnesses appeared.

May I inquire of you, Mr. Johnson, whether, pursuant to my letter or [88] otherwise, which has now been directed, you directed any of those gentlemen not to appear?

Mr. Johnson: I directed them not to. Strike that.

I directed Mr. Mello, Mr. Folden, Mr. Banville, and Mr. D. B. Lewis, whom I represent, not to be here on the ground that the subpoena and subpoena duces tecum were void, and on behalf of those people, I declined, with all due respect to the Examiner's ruling, I declined to produce these named individuals. Mr. Sheppard represents the others.

Mr. Sheppard: That is correct, Mr. Wilson. The petition that came in in the intermission that we were discussing earlier cites the names of the remaining people Mr. Johnson mentioned that I represent, and I also advised them not to appear at that time on the ground set forth in the petition to revoke the subpoena and the petition to revoke the petition duces tecum.

Mr. E. Wilson: I understand, Mr. Sheppard, that a petition has been received from you or from your office, and no doubt it will be referred to the Trial Examiner.

With respect to those persons whom I have named, other than those that Mr. Johnson named, have you in fact directed them not to appear?

Mr. Sheppard: I will read the names. Mr. Schubert, Mr. Lisser, Mr. Holguin, Mr. Miller, Mr. Loera, and Mr. Walter Schmidt.

Mr. E. Wilson: I withdraw that. I expect that

the Regional Director will be referring the Association's petition to revoke to you. It may be that it is ready at this instant to be brought in here. May I suggest that we take a very short recess so that I can find out what the disposition of it is.

Trial Examiner: We will take a short recess.

(A short recess was taken.)

Trial Examiner: On the record.

Mr. E. Wilson: May I have marked, sir, as General Counsel's Exhibit 1-TT for identification an order of Regional Director Becker referring to you, sir, as Trial Examiner, for ruling—for Board ruling for petition to revoke the subpoena filed by the law offices of Alva C. Baird by G. A. Sheppard on behalf of Joe Loera, Anastacio Holguin, William L. (Roy) Miller, Otto Schubert, Walter O. Lisser and Walter Schmidt, attached to which order are copies of the petition to revoke subpoenas referred to. [89]

(The document referred to was marked as General Counsel's Exhibit 1-TT for identification.)

Mr. E. Wilson: I offer General Counsel's Exhibit 1-TT for identification in evidence.

Trial Examiner: Hearing no objection, General Counsel's Exhibit 1-TT is received.

(The document heretofore marked as General Counsel's Exhibit 1-TT for identification was received in evidence.)

Trial Examiner: General Counsel's 1-TT also includes a subpoena duces tecum apparently served on Walter Schmidt, Secretary-Treasurer of the As-

sociation requiring the production of certain documents. The petition is to revoke subpoenas ad testificandum as to four individuals, and a petition to revoke the petition, subpoena duces tecum, as to Schmidt.

As to the petition to revoke, the subpoenas ad testificandum were laid upon the same ground as I have already ruled upon, that is, that there is no authority in the Regional Director or any one not a member of the Board to issue such subpoenas. That the service is bad or that actually, the issuance is a nullity. That the General Counsel is not a party. It is my opinion that under the rulings of the Board, and particularly under the Rules and Regulations, that neither position can be supported before the Board.

The petition to revoke the subpoenas and testificandum, addressed to Loera, Holguin, Miller, Schubert, and Lisser is denied. Earlier, I said four ad testificandum petitions. Apparently there are five.

As to the subpoena duces tecum addressed to Walter Schmidt—We will be off the record while I read this a little more carefully.

(Discussion off the record.)

Trial Examiner: Mr. Sheppard, I have already ruled against you on two of the grounds on which you rely in respect to the Schmidt subpoena. The listing, A, of the documents, which the General Counsel seeks to have Mr. Schmidt produce in my opinion indicate upon their face a relevancy to the matters complained of.

Is there anything further that you care to say at this point in connection with that?

Mr. Sheppard: I think the petition sets forth my position.

Trial Examiner: The petition to quash is denied.

Mr. E. Wilson: I understand, Mr. Sheppard, that the persons that you have named in this petition to revoke, you have advised them not to appear at this hearing on the ground that the subpoena is void.

Mr. Sheppard: I have so stated.

Mr. E. Wilson: I have some people subpoened for tomorrow, one of whom, for example, is Grammont Banville. I wonder if either you, Mr. Sheppard, or you, Mr. Johnson, or Mr. Wilson, will advise me whether it is the intention of one or the other or you or all of you to advise Mr. Banville in the same fashion as you have already advised these witnesses who have been subpoened for today.

Mr. Johnson: I have so advised Mr. Banville.

Mr. E. Wilson: Is it your intention to file a petition to revoke the petition—the subpoena served on him?

Mr. Johnson: I have filed one already.

Mr. E. Wilson: I didn't realize that Banville was one of them.

Mr. E. Wilson: Mr. Trial Examiner, I had intended to, as I think that letter in evidence—or rather rejected—shows, to call Mr. D. B. Lewis and Mr. Walter Schmidt, as my first witnesses, and then proceed with those others who were subpoened for today.

I do have some other witnesses that I have subpoened for tomorrow and Wednesday, but frankly, this matter of petition to revoke has taken me completely by surprise. I did not expect it.

I think that at 12:30, a luncheon recess would be in order, and at the close of that recess or when we next get going, I can let you know what my intentions are. Whether to continue with what I have got and seek enforcement of those subpoenas, or to ask for a continuance pending enforcement of those subpoenas. At the moment, I don't know just which I intend to do.

Trial Examiner: That will be satisfactory with me.

You haven't asked counsel, at least in my hearing, whether in view of the fact that the petitions to quash have been denied, whether they still will advise the persons concerned in the same fashion.

Mr. E. Wilson: I do ask counsel, if I may speak to you. Mr. Sheppard. The Trial Examiner has ruled on your petition to revoke. Has denied your [91] petition. Will the witnesses, on whose behalf you appeared and made your petition, appear here this afternoon and tomorrow to testify?

Mr. Sheppard: My advice to them will be no, on the grounds that it is jurisdictional, and on the other points and authorities raised throughout both petitions, subpoenas duces tecum, and——

Mr. E. Wilson: May I inquire of you, Mr. Johnson. What is your position with respect to Mr. Schmidt and the other persons on whose behalf you appear.

Mr. Johnson: I don't represent Mr. Schmidt.

Mr. E. Wilson: I am sorry. Mr. Lewis.

Mr. Johnson: On behalf of the people I represent, with all due deference to the Trial Examiner's ruling, and I understand that he must follow the Board's Rules and Regulations until something is shown to the contrary, I will instruct the people that I have appeared for not to appear in this proceeding.

Trial Examiner: Is 2 o'clock a suitable hour for all of you?

We will recess until 2.

Mr. W. Wilson: May I ask the Hearing Officer a question. The hearing is listed to last five days. The reason I ask this is because I have a criminal case set for Monday morning in Inglewood. If this should continue over, I wonder if I may be excused, as long as Mr. Johnson is present.

Mr. Johnson: I want to point out that I have an arbitration scheduled for tomorrow, and either now or at 2 o'clock, I ask that the matter be continued on the ground that I am special labor counsel in this proceeding.

Trial Examiner: We can answer that better at 2 o'clock.

(Whereupon, at 12:33 p.m., the hearing recessed for lunch until 2 p.m. that same day.)

Afternoon Session—2 P.M.

Trial Examiner: On the record.

Mr. E. Wilson: Mr. Trial Examiner, during the noon recess, I considered the situation in which I

find myself because of the failure of witnesses to appear. I find that it is necessary, for proper presentation of my evidence, [92] to have the appearance of those witnesses that I have subpoened, petitions to revoke said subpoenas having been denied by you.

I am going to ask for a continuance of an indefinite time, pending petitions to have the subpoenas enforced by the United States District Court.

I may say that I expect that they shall be enforced, and if enforced; I should then like to have the hearing continued upon three days notice from the Trial Examiner. That is, resumed upon three days notice from the Trial Examiner.

Mr. Sheppard: Did I understand three days from the enforcement order, if there were one.

Mr. E. Wilson: Three days notice from the Trial Examiner.

Trial Examiner: I assume there is no objection to the continuance. Your request, of course, will be made, I suppose, of the Court that in the event that the petition is enforced, that the subpoenas are enforced, that it be referred back to the Trial Examiner, and he set a date within the three days.

Mr. E. Wilson: I shouldn't think so, sir. I think you still have charge of this hearing, and that you set and determine the time in which we will resume.

I may be all wrong. All that I would expect to do with the Court is ask the Court to enforce the subpoenas.

Trial Examiner: Off the record.

(Discussion off the record.)

Trial Examiner: On the record.

Mr. E. Wilson: I think that is what I have just heard from my superior. The District Court would direct the witnesses to appear at a date to be set by the Trial Examiner.

Mr. W. Wilson: I wonder if it wouldn't be better, in connection with that, Mr. Wilson, that Mr. Wilson contact the different attorneys to ascertain what days we might be tied up. With three days notice, it might catch some of us in the middle of a trial.

Mr. E. Wilson: I think we might explore the situation in respect to the calendar of the various attorneys present. [93]

Trial Examiner: Wouldn't that be pretty difficult to do? You don't know when you will be able to get before a Judge, although possibly this week.

Mr. E. Wilson: I should certainly hope so. That is what I should endeavor to do. I do think, Mr. Trial Examiner, if we are to put off exploring the calendar condition indefinitely, we may find that we are too indefinite as to when we finally get back.

I think all counsel for the parties should be aware of the fact that we do have a hearing which is now being continued on through necessity that should resume as quickly as possible. They should now consider when they are setting up their calendars for the future the fact that this may be set down upon rather short notice.

Trial Examiner: Ask whatever questions you have in mind, then.

Mr. E. Wilson: I would like to know, for example, from Mr. Sheppard, if I may, what the condition of his calendar is within the next six weeks.

Mr. Sheppard: Outside of the next week, I really wouldn't know until I look at the calendar.

Mr. W. Wilson: I will have to call my office. I could call you back this afternoon.

Mr. E. Wilson: I wonder if that couldn't be done on the telephone now for the convenience of all the parties here.

Trial Examiner: It seems almost certain that at some time within the next six week period, there would be conflicts. If you feel that there is a reasonable likelihood of getting the subpoenas enforced this week, then why don't we talk about next week.

Mr. Hackler: May I, in that connection, make this inquiry. The charging parties have no objection to the continuance if the Government feels it is necessary to properly present the case. However, I think it is only fair to ask, in view of the nature of the objections here raised against these subpoenas, which seem to me to go to the authenticity of the subpoenas themselves as distinct from objections that are sometimes made as to scope, as to whether the parties, the attorneys who have petitioned to invoke on behalf of these witnesses, will obey, if an order, if one is forthcoming, forcing these [94] subpoenas out of the District Court, are contemplating appealing? There is certainly no purpose in thinking in terms of two or three weeks, and what suggests that to me is the nature of the

objection and the citation of authority given.

If counsel feels that his legal position is such that he would appeal, feel constrained to appeal an adverse ruling as to any of these subpoenas, the subpoena as well as subpoenas duces tecum, it would seem fruitless to me at the moment to explore the immediate future for a setting.

I don't know whether counsel is prepared to make a representation or statement of a view, but it seems rather odd here to take time out to get an order of enforcement if counsel, for policy reasons, knows that he will carry the matter beyond the District Court.

Mr. Johnson: In reply to that, speaking for the Lewis Food Company, I had made up my mind in one respect at the time that I entered this hearing, that a certain course of action would be taken, but since we started in this hearing, I have received a call from my office that the Teamsters Union has resumed its picketing and boycotting this morning at the plant, and that will affect my thinking on the matter, and I am not prepared to state what would be our position until I consult with my client, which I have not had a chance to do.

Trial Examiner: I doubt very much that we can accomplish anything by having counsel consider their calendar situation. I think perhaps the best thing to do is just go ahead as you planned with your petition to enforce, and then I will set a date, and set it as soon as possible, and of course, I will give whatever consideration I think the circumstances require to the situation of counsel.

Acting pursuant to this authority, the Board promulgated, in Section 102.35 of its Rules and Regulations, the rule that "the trial examiner shall have authority . . . (c) to rule upon petitions to revoke subpoenas."

We hold that this rule of procedure is within the legitimate purview of the Board's power under Section 6 of the Act. The Board, of course, may not enlarge its authority beyond the scope intended by Congress, but the Board, where such restrictive intention is not shown, may adopt rules and regulations to carry out its myriad functions in a manner consistent with the fulfillment of the purposes of the Act. This is exactly what has been done here.

III. *General Counsel As a Party to an Unfair Labor Practice Proceeding.*

We come then to the third question tendered by this appeal. Appellees assert that the General Counsel (or his representative) is not a party to an unfair labor practice proceeding and hence cannot obtain the issuance of subpoenas.

The term "party" is not defined in the Act. The definition contained in the Administrative Procedure Act is not decisive.[5] Again, we resort to related provisions, and the policies of the Act.

[fol. 98] This Court has declared that "in its broadest meaning the word 'party' includes one concerned with, conducting, or taking part in any matter or proceeding, whether he is named or participates as a formal party or not." *Fong Sik Leung* v. *Dulles*, 9 Cir., 226 F.2d 74, 81. Is the General Counsel under the Act a "party" to an unfair labor practice proceeding for purposes of securing the issuance of subpoenas?

The 1947 amendments to the National Labor Relations Act expanded the authority and enhanced the status of the

[5] Section 2(b) of the A.P.A. defines "party" as follows:

"Party includes any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any agency proceeding."

General Counsel in connection with the conduct of unfair labor practice proceedings.

> "By §3(d), supra, the authority formerly exercised by the Board to investigate charges and to issue complaints under §10 was vested in the general counsel. The well-understood purpose of Congress here was to effect a separation of the prosecuting and adjudicating functions within the Board." *Haleyon Drug Stores* v. *National Labor Relations Board*, 9 Cir., 187 F.2d 418, 421.

By virtue of §3(d) the General Counsel has "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board." His decision on whether to issue a complaint charging an unfair labor practice is final and is not reviewable by either the Board or the courts. *Lincourt* v. *National Labor Relations Board*, 1 Cir., 170 F.2d 306; *Hourihan* v. *National Labor Relations Board*, D.C. Cir., 201 F.2d 187; *Anthony* v. *National Labor Relations Board*, 6 Cir., 204 F.2d 832. If he decides to direct issuance of a complaint, it is his responsibility to prosecute the matter. In this role also he exercises broad powers. *International Union, etc.* v. *National Labor Relations Board*, 9 Cir., 231 F.2d 237, 242. Here then is an official who has life-or-death authority over the initiation of an unfair labor practice proceeding and who, if he determines that such proceedings should be commenced, is entrusted with the task of prosecution. Yet appellees urge that this official lacks authority to apply for the issuance of a subpoena. The argument is untenable.

The *Pesante* and *Duval* cases are neither contrary nor apposite. Both involved the question of whether a Regional [fol. 99] Director was a party to a representative hearing, as distinguished from an unfair labor practice proceeding.[*]

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[*] In *Pesante* the court held that a Regional Director was not a "party" in a representative hearing within the meaning of Section 11(1) of the Act and therefore was not entitled to the issuance of a subpoena. The Fifth Circuit, in the *Duval* case held directly contrary to *Pesante* and expressly rejected the reasoning in the latter opinion. Of course, we need not decide between the opposing views in the case at bar.

A Regional Director's duties in respect to representative hearings are far different from those the General Counsel performs in connection with unfair labor practice proceedings.

One point remains. It is that counsel for the General Counsel, not the General Counsel himself, sought the subpoenas. No citation of cases is necessary to restate the rule that in legal contemplation counsel representing counsel occupies the identical legal status of the person he represents. Therefore, if the General Counsel could apply for the issuance of subpoenas, as we have held, counsel representing him could also do so validly.

The order of the District Court is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

[File endorsement omitted]

[fol. 100] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No: 15,307

NATIONAL LABOR RELATIONS BOARD, Appellant,

v.

D. B. LEWIS, President, LEWIS FOOD COMPANY, et al., Appellees.

JUDGMENT—Entered October 29, 1957

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the order of the said District

Court in this cause be, and hereby is reversed, and that this cause be, and hereby is remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court.

[fol. 101] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 102]

SUPREME COURT OF THE UNITED STATES

No. 684, October Term, 1957

D. B. LEWIS, President, LEWIS FOOD COMPANY; HENRY MELLO; MAYNARD (MAC) FOLDEN; et al., Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD.

ORDER ALLOWING CERTIORARI—January 27, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted. The case is transferred to the summary calendar and assigned for argument immediately following No. 234.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsed]: No. 15307. United States Court of Appeals for the Ninth Circuit. National Labor Relations Board, Appellant, vs. D. B. Lewis, President, Lewis Food Company, et al., Appellees. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: September 29, 1956.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 15,307

NATIONAL LABOR RELATIONS BOARD,
Appellant,

v.

D. B. LEWIS, PRESIDENT, LEWIS FOOD COMPANY; HENRY MELLO; MAYNARD (MAC) FOLDEN; GRAMMONT BANVILLE; JOE LOERA; ANASTACIO HOLQUIN; WILLIAM L. (ROY) MILLER; OTTO SCHUBERT; WALTER O. LISSER; and WALTER SCHMIDT, SECRETARY-TREASURER OF ASSOCIATION OF INDEPENDENT WORKERS OF AMERICA,
Appellees.

STATEMENT OF POINTS UPON WHICH THE NATIONAL LABOR RELATIONS BOARD INTENDS TO RELY

1. The Trial Examiner had authority to rule upon appellees' petitions to revoke subpenas.

2. The subpenas were properly issued at the request of the General Counsel.

Dated at Washington, D.C. this 1st day of November, 1956.

/s/ MARCEL MALLET-PREVOST
Assistant General Counsel, National Labor Relations Board.

[Endorsed]: Filed Nov. 5, 1956. Paul P. O'Brien, Clerk.

[fol. 88] Minute Entry of Argument and Submission—May 14, 1957 (omitted in printing).

[fol. 89]

In United States Court of Appeals
for the Ninth Circuit

Before: Fee, Barnes and Hamley, Circuit Judges.

Minute Entry of Order Directing Filing of Opinion and Filing & Recording of Judgment—October 29, 1957

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

[fol. 90]

In United States Court of Appeals
for the Ninth Circuit

No. 15,307

National Labor Relations Board, Appellant,

v.

D. B. Lewis, President, Lewis Food Company; Henry Mello; Maynard (Mac) Folden; Grammont Banville; Joe Loera; Anastacio Holquin; William L. (Roy) Miller; Otto Schubert; Walter O. Lisser; and Walter Schmidt, Secretary-Treasurer of Association of Independent Workers of America, Appellees.

Appeal From the United States District Court for the Southern District of California,
Central Division.

OPINION—October 29, 1957

Before: Fee, Barnes and Hamley, Circuit Judges

Barnes, Circuit Judge:

The National Labor Relations Board appeals from an order of the District Court denying enforcement to certain subpoenas duces tecum and ad testificandum purportedly issued by the Board and directed to the appellees.

On April 30, 1956, the General Counsel, by the Regional Director in Los Angeles, California, filed a consolidated complaint against the Lewis Food Company and the Association of Independent Workers of America, alleging that the company and the union were engaging in various unfair labor practices in violation of the Labor-Management Relations Act of 1947, (hereafter "Act"). Pursuant to the written request of counsel for the General Counsel, the Regional Director, acting under Section 11(1) of the Act, [fol. 91] issued the subpoenas in question under the seal of the Board and the facsimile signature of Abe Murdock, a member of the Board. Appellees filed petitions to revoke the subpoenas with the Regional Director principally on the grounds that (1) the Board lacked authority to delegate its power to issue subpoenas to the Regional Director, and (2) counsel representing the General Counsel is not a "party" to an unfair labor practice proceeding and therefore is not entitled to the issuance of subpoenas. The Regional Director referred the petitions to the trial examiner. The trial examiner refused to quash the subpoenas. Appellees remained adamant in their determination not to comply with the subpoenas. The Board then filed with the court below an application for an order requiring appellees to obey the subpoenas. The unfair labor practice proceeding was continued pending the disposition of this matter. The appellees resisted enforcement of the subpoenas on the two grounds stated above, and additionally, on the ground that the trial examiner lacked authority to pass upon their petitions. The court below sustained their position without opinion, citing only the decision in *National Labor Relations Board* v. *Pesante*, S.D. Calif., 119 F.Supp. 444.

There are three questions raised by this appeal. (1) Does the Board have authority under the Act to delegate

to its subordinate, the Regional Director; the power to issue subpoenas? (2) Does the trial examiner have authority to rule on petitions to revoke subpoenas? (3) May a valid subpoena be issued at the request of counsel for the General Counsel?

Board counsel conceded on oral argument that the Board must prevail on all three issues to gain a reversal. Each issue turns on the meaning of Section 11(1) of the Act.[1] They will be discussed in the order stated above.

[fol. 92] I. *Delegation of Power to Issue Subpoenas*

Section 11(1) provides that the "Board, or any member thereof" may issue subpoenas. Appellees' argument, in essence, is that the section means what it says, the Congress knew how to make the power delegable if it wanted to do so as evidenced by other portions of Section 11(1) author-

[1] It provides: "Sec. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10—(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whole production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place in the United States or any Territory or possession thereof, at any designated place of hearing."

izing the Board or "its duly authorized agents or agencies" to perform certain functions, and that Congress' failure to make the power expressly delegable manifests an intention that it be non-delegable.

This question and the next one relating to the delegation of power to pass on petitions to revoke subpoenas pose similar problems of statutory construction. The basic problem, and a frequently recurring one in modern times, is to ascertain whether when a particular power is granted to a person or body of persons, the power is delegable to subordinates, and if delegable at all, to which subordinates it is delegable.

In each instance in the case at bar Section 11(1) explicitly empowers only the Board, or a member thereof, to perform certain functions. Nowhere does the Act make the particular powers delegable, but neither does it anywhere expressly prohibit delegation. Does this silence indicate prohibition or permission?

There is no short and automatic answer to this difficult and complex but very practical question. There is not even the frequently found presumption with which to tilt the [fol. 93] scales. The determination of the question calls for a studied consideration of the Act, its legislative history, and its legislative objectives.

We start the journey, as with all statutes, by examining the literal wording of the section. The language of a statute is the best and most reliable index of its meaning. Where the language is clear and unequivocal it is determinative unless the literal language does not comport with the intent and objectives of the statute viewed as a whole. However, where as in the instant cause, the statute is completely silent on the point in question, it is necessary to analyze that statute as a whole, and its history and purposes, to ascertain what interpretation must be ascribed to the silence.

In regard to the delegability of the Board's subpoena issuing power to a Regional Director, no court which has considered this question has construed Section 11(1) of the Act in the narrow and restricted manner appellees urge upon us. On the contrary, all courts which have passed on the merits of this issue have interpreted the statute as

empowering the Board to delegate the subpoena power. The leading decision on this precise point is *National Labor Relations Board* v. *John S. Barnes Corp.*, 7 Cir., 178 F.2d 156, where the Court held that a subpoena issued by a Regional Director under the facsimile signature of a Board member is valid. That decision has had the subsequent approval of the Fifth Circuit. *Edwards* v. *National Labor Relations Board*, 5 Cir., 189 F.2d 970; *Jackson Packing Co.* v. *National Labor Relations Board*, 5 Cir., 204 F.2d 842. Even the *Pesante* decision, supra, held in favor of the Board on this question. The opinion in the *Barnes* case is sound and well-reasoned. It is fully consonant with the policies and purposes of the Act. Appellees put forth no reasons which persuade us that these cases are erroneous and should be disapproved. Therefore, we hold that subpoenas may validly be issued by a Regional Director under the facsimile signature of a Board member.

There is nothing in the Supreme Court opinions in *Cudahy Packing Co.* v. *Holland*, 315 U.S. 357, and *Fleming* v. *Mohawk*, 331 U.S. 111, which compels a different result or casts doubt upon the validity of our resolution of this issue. Those cases are not controlling. The *Cudahy* decision merely held that the Fair Labor Standards Act did not [fol. 94] grant the Administrator the power to delegate his subpoena power to subordinates, while on the other hand, the *Mohawk* case held that the Administrator of the Emergency Price Control Act was authorized to delegate the authority to issue subpoenas. Each of those cases involved the construction of a statute different from that which concerns us. Accordingly, those decisions, one upholding the delegability of this power and the other denying it, do not govern the instant case.

II. *Delegation of Power to Revoke Subpoenas*

Section 11(1) states in pertinent part that "The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas" and that the person to whom the subpoena is directed "may petition the Board to revoke, and the Board shall revoke, such subpoena" if the evidence sought is not relevant or is not described with sufficient particularity.

The trial examiner, not the Board, denied appellees' petitions to revoke the subpoenas. It was his action which was reviewed by the court below. If he lacked authority to pass on these petitions, then there has been no review of this matter by the proper administrative body. If such be the posture of these proceedings, it was premature to bring these proceedings before the court below before the proper and duly constituted body had passed on the petitions. Thus, if appellees' position be sustained on this point, the order denying enforcement must be affirmed.

The court below relied solely on the *Pesante* decision. There it was held that only the Board itself is authorized by Section 11(1) to sit on petitions to revoke subpoenas. The Fifth Circuit in *National Labor Relations Board* v. *Duval Jewelry Co., et al.*, 243 F.2d 427, agreed with the *Pesante* decision insofar as subpoenas duces tecum are concerned. In respect to subpoenas ad testificandum, the Fifth Circuit held that since Section 11(1) on its face makes no provision as to procedure to test the validity of subpoenas of this type, application for their enforcement cannot be considered premature even if initially reviewed by a trial examiner.[2]

[fol. 95] The Seventh Circuit takes a different view. In *National Labor Relations Board* v. *Gunaca*, 7 Cir., 230 F.2d 542, it affirmed, on the opinion below, *N.L.R.B.* v. *Gunaca*, 135 F.Supp. 799, a decision upholding the right of a trial examiner to pass on petitions to revoke subpoenas.[3] Both the Court of Appeals and the District Court in the *Gunaca* case considered the *Pesante* case, and the considerations therein set forth, and refused to follow. This is also the position taken by then District Judge Medina in *National Labor Relations Board* v. *International Typographical Union*, 76 F.Supp. 895. For the reasons hereinafter set forth, we believe that this is the correct view.

The approach taken in the *Pesante* and *Duval* cases is that the Act itself bars delegation. We find no such preclusion. Certainly there is no express negation of the

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[2] We need not pass on the validity of this distinction in light of our resolution of this issue.

[3] See also N.L.R.B. v. John S. Barnes Corp., supra.

power to delegate. The Act sanctions the Board to rule on these petitions; but it does not expressly forbid the Board to delegate this function. Nor do we feel it mandatory to imply such an intent. The Congressional history, though somewhat favorable to appellees' position, is realistically meager and inconclusive.[1] The Act was discussed prolifically in Congress, but the delegability of powers granted by Section 11(1) was not. We concur in Judge Grubb's statements in the *Gunaca* case, supra, 135 F.Supp. at 794:

> [fol. 96] "It would seem to this Court that one should be very slow to presume that the Congress intended to enact a statute which would require a review of testimony possibly two or three thousand miles from the place where the testimony was taken after having it transcribed with all the attendant delays and expense in proceeding before the N.L.R.B. that would be involved. Such construction would make it impossible as a practical matter for the N.L.R.B. to carry out its functions. Certainly they couldn't carry them out expeditiously as Congress no doubt intended. Labor peace or proper labor relations would be sacrificed to innumerable administrative delays . . . Such construction would put an impossible burden on the Board."

[1] The original House Bill, H.R. 3021, provided that a person to whom a subpoena had been directed could "petition the Board, or its duly authorized agent or agents, to revoke and the Board, or such agent or agents, shall revoke such subpoena if in its, his, or their opinion, as the case may be, the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its, his, or their opinion, as the case may be, such subpoena does not describe with sufficient particularity the evidence whose production is required." The original Senate Bill, S. 1126, contained no provision dealing with petitions to revoke subpoenas. The Section as finally approved was essentially the House version with the express delegation of power to pass on petitions to revoke subpoenas deleted. Whether this revision was made because it was felt that the added language was superfluous or because Congress doubted the wisdom of granting this power to anyone other than the Board itself, is not disclosed by the Committee or Conference reports or Congressional debates. Taken alone, the change of language, while helpful to appellees, is not persuasive.

The Court of Appeals approves Judge Grubb's "well reasoned opinion," considers his conclusions sound, and his result correct.

The N.L.R.B. was established to facilitate the peaceful settlement of labor disputes. The practical difficulties in administration which would arise as a consequence of holding that the power to rule on petitions to revoke subpoenas is non-delegable would substantially impede the effectuation of the Board's primary function. Accordingly, it is unreasonable to attribute to Congress an intention to compel such a result.

If the power to delegate has not been withdrawn, as we believe it has not, has it been granted affirmatively?

The *Mohawk* decision supplies the answer to that question. There, as here, the particular statute in question contained a broad rule-making power. Section 201(d) of the Emergency Price Control Act provided:

> "The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper to carry out the purposes and provisions of this Act."

Addressing itself to the question of whether this Section could be relied upon as a basis for delegating certain functions, the Supreme Court said, 331 U.S. at 121,

> "Such a rule-making power may itself be an adequate source of authority to delegate a particular function, [fol. 97] unless by express provision of the Act or by implication it has been withheld. See Piapao Laboratories v. Farley, 67 App.D.C. 304, 92 F.2d 228."

Section 6 of the Labor-Management Relations Act vests the Board with as much rule-making authority as that possessed by the Administrator under the E.P.C.A. It reads:

> "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter."